2439

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 230.

EDWARD W. SPEED, AS ADMINISTRATOR OF WILLIAM B. FRANKLIN, DECEASED, ET AL., PLAINTIFFS IN ERROR,

vs.

PATRICK B. McCARTHY.

IN ERROR TO THE CIRCUIT COURT OF PENNINGTON COUNTY, STATE OF SOUTH DAKOTA.

FILED MARCH 26, 1900.

(17,689.)

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INDEX.

	Original.	Print.
Caption	a	1
Clerk's certificate and return to writ of error	1	1
Marshal's return of service of citation	3	2
Citation	4	3
Marshal's return of service of writ of error	6	3
Writ of error	7	4
Order allowing writ of error	11	6
Bond on writ of error	13	6
Assignment of errors	17	8
Petition for writ of error	27	13
Summons	30	14
Complaint	31	15
Amended answer	34	17
Opinion in circuit court	39	20

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	Original.	Print.
Decision of circuit court	43	22
Findings of fact	43	22
Conclusions of law	49	26
Order for judgment	50	27
Judgment of circuit court	51	27
Notice of motion for new trial	54	29
Order overruling motion for new trial	57	31
Notice of appeal	58	31
Bond on appeal	59	32
Opinion of supreme court of South Dakota, filed December 21, 1898	61	34
Opinion of supreme court of South Dakota, filed September 2, 1899	71	40
Remittitur from supreme court of South Dakota	74	42
Judgment on remittitur	77	44

a In the Circuit Court of the Seventh Judicial Circuit in and for Pennington County, South Dakota.

PATRICK B. McCARTHY, Plaintiff, *vs.* EDWARD W. SPEED, as Administrator of the Estate of William Franklin, Deceased, *et al.*, Defendants.	Record and Proceedings in Circuit Court of Pennington County, South Dak. Certified to Supreme Court of the United States upon a Writ of Error at the Instance of the Defendants.

1 STATE OF SOUTH DAKOTA, } ss:
County of Pennington, }

In pursuance of the command of the writ of error within, I, John P. McElroy, Jr., clerk of the circuit court in and for the county of Pennington, in the State of South Dakota, herewith transmit a copy of the record, assignment of errors, and all proceedings as hereinafter set forth in the case of Patrick B. McCarthy, plaintiff, against Edward W. Speed, as administrator of the estate of William B. Franklin, deceased; Cora C. Stone, as heir-at-law of said William B. Franklin, deceased; Georgia B. Bierman, as sole devisee and heir-at-law of Jennie E. Franklin, deceased; Alvah F. Fay, as executor of the last will of said Jennie E. Franklin, deceased; Thomas C. Blair, Albert Amsbury; John S. George, George E. Yost, and Philip M. Ranney, as executors of the last will and testament of John J. Fayel, deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, her guardian, as heirs at-law and successors in interest of said John J. Fayel, deceased, lately pending in the said circuit court in and for the county of Pennington, within the seventh judicial circuit of the State of South Dakota, under my hand and the seal of said court.

That said record and proceedings as hereby certified and transmitted consists of the following, viz: The original citation to the plaintiff, Patrick B. McCarthy, and his attorneys, with proof of service thereof; the original writ of error with proof of service upon the plaintiff, Patrick B. McCarthy, and his attorneys; the original order fixing the amount of defendants' bond in this proceeding; the original bond herein in the sum of one thousand dollars for costs for the benefit of the plaintiff, duly approved by the judge of said circuit court of Pennington county, South Dakota; the original assignment of errors herein, and the original petition for a writ of error herein, together with proof of filing each thereof.

2 Also a true, full, perfect, and complete copy of all proceedings except the evidence had herein in said circuit court of Pennington county, South Dakota, and the judgments of the supreme court of South Dakota on appeal from said circuit court as follows, to wit: Copy of the summons, complaint, amended answer, opinion of circuit court upon the trial hereof, decision of trial court in circuit court of Pennington county, South Dakota, consisting of findings of fact, conclusions of law and direction for judgment

in favor of defendants and against the plaintiff, judgment of circuit court of Pennington county, South Dakota, in favor of defendants and against the said plaintiff, Patrick B. McCarthy; plaintiff's notice of motion for a new trial, order overruling plaintiff's motion for a new trial, notice of appeal to supreme court of South Dakota, undertaking on appeal, first opinion of supreme court of South Dakota on appeal from said circuit court of Pennington county, which was filed December 21, 1898; second opinion of said supreme court, filed September 2, 1899; remittitur from supreme court of South Dakota, and judgment of said circuit court of seventh judicial circuit of South Dakota in and for Pennington county upon the mandate and direction of the supreme court of the State of South Dakota, dated January 13, 1900.

And I further certify that the same are and constitute the whole and every part of said record and proceedings, except the evidence in said cause, as the same remains of file and on record in my office, and the same are hereby transmitted and certified to the clerk of the Supreme Court of the United States, at Washington, D. C., pursuant to said writ of error.

Witness my official signature and the seal of said circuit court, at Rapid City, in said county of Pennington, this 7th day of March, in the year of our Lord one thousand and nine hundred, and of the Independence of the United States the one hundred and twenty-fourth.

[Seal Circuit Court, Pennington County, South Dakota.]

JOHN P. McELROY, JR.,
Clerk of Circuit Court in and for Pennington County, South Dakota.

[10-cent U. S. internal-revenue stamp, canceled 3, 7, 1900. J. P. McE., Jr.]

3 UNITED STATES OF AMERICA, }
District of South Dakota, } ss:

I hereby certify that the annexed and within citation came into my hands for service on the 16th day of February, A. D. 1900, and on the 16th day of February, A. D. 1900, I served the said within annexed citation on the said Patrick B. McCarthy, therein named as defendant in error, at the city of Rapid City, in the county of Pennington, in the district and State of South Dakota, by then and there delivering to and leaving with the said Patrick B. McCarthy personally a true copy of the said within and annexed citation.

And I further certify that I served the within and annexed citation on Charles W. Brown, attorney for the said defendant in error, Patrick B. McCarthy, on the 16th day of February, A. D. 1900, at the city of Rapid City, county of Pennington, in the district and State of South Dakota, by then and there delivering to and leaving with him personally a true copy of the within and annexed citation.

Dated at Deadwood, in the district of South Dakota, this 17th day of February, A. D. 1900.

EDWARD G. KENNEDY,
United States Marshall for the District of South Dakota,
By JOHN P. BELDING, *Deputy.*

Marshall Fees.

Serving citation	$8.00
Travel	8.40
Copies	1.00
	$17.40

4 UNITED STATES OF AMERICA, *ss:*

To Patrick B. McCarthy, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court in and for the county of Pennington, in the State of South Dakota, wherein Edward W. Speed, as administrator of the estate of William B. Franklin, deceased; Cora C. Stone, as heir-at-law of said William B. Franklin, deceased; Georgia B. Bierman, as sole devisee and heir-at-law of Jennie E. Franklin, deceased; Alvah F. Fay, as executor of the last will of said Jennie E. Franklin, deceased; Thomas C. Blair, Albert Amsbury; John S. George, George E. Yost, and Philip M. Ranney, as executors of the last will and testament of John J. Fayel, deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, her guardian, as heirs-at-law and successors in interest of said John J. Fayel, deceased, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 1st day of February, in the year of our Lord one thousand and nine hundred.

LEVI McGEE
Presiding Judge of the Circuit Court of South Dakota in and for Pennington County.

5 [Endorsed:] United States of America. Citation. Filed February 17, 1900. John P. McElroy, Jr., clerk of courts.

6 UNITED STATES OF AMERICA, *District of South Dakota,* } *ss:*

I hereby certify that the annexed and within writ of error came into my hands for service on the sixteenth day of February, A. D. 1900, and on the said sixteenth day of February, A. D. 1900, I served the said within annexed writ of error on the said Patrick B. McCarthy, therein named as defendant in error, at the city of Rapid City, in the county of Pennington, in the district and State of South Dakota, by then and there delivering to and leaving with the said Patrick B. McCarthy personally a true copy of said within and annexed writ of error.

And I further certify that I served the within and annexed writ

of error on Charles W. Brown, attorney for the said defendant in error, Patrick B. McCarthy, on the said sixteenth day of February, A. D. 1900, at the city of Rapid City, in the county of Pennington and in the district and State of South Dakota, by then and there delivering to and leaving with him, said Charles W. Brown, personally a true and correct copy of said writ of error.

Dated at Rapid City, in the district of South Dakota, this sixteenth day of February, A. D. 1900.

EDWARD G. KENNEDY,
United States Marshall for the District of South Dakota,
By JOHN P. BELDING, *Deputy.*

Marshall's Fe-s.

Serving writ, 2 persons	$8.00
Travel—42 miles & return	8.40
Copies	1.00
	$17.40

7 UNITED STATES OF AMERICA:

The President of the United States of America to the honorable the judge of the circuit court in and for the county of Pennington, in the State of South Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court in and for the county of Pennington, in the State of South Dakota, before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Patrick B. McCarthy, plaintiff, and Edward W. Speed, as administrator of the estate of William B. Franklin, deceased; Cora C. Stone, as heir-at-law of said William B. Franklin, deceased; Georgia B. Bierman, as sole devisee and heir-at-law of Jennie E. Franklin, deceased; Alvah F. Fay, as executor of the last will of said Jennie E. Franklin, deceased; Thomas C. Blair, Albert Amsbury; John S. George, George E. Yost, and Philip M. Ranney, as executors of the last will and testament of John J. Fayel, deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, her guardian, as heirs-at law and successors in interest of said John J. Fayel, deceased, defendants, wherein was drawn in question the construction of the statutes of the United States and the decision was against the title, right, privileges, and exemption specially set up and claimed under such statutes, and manifest error hath happened, to the great damage of the said Edward W. Speed, as administrator of the estate of William B. Franklin, deceased; Cora C. Stone, as heir at-law of said William B. Franklin, deceased; Georgia B. Bierman, as sole devisee and heir-at-law of Jennie E. Franklin, deceased; Alvah F. Fay, as executor of the last will of said Jennie E. Franklin, deceased; Thomas C. Blair, Albert Amsbury; John S. George, George

8 E. Yost, and Philip M. Ranney, as executors of the last will and testament of John J. Fayel, deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel,

her guardian, as heirs at-law and successors in interest of said John J. Fayel, deceased, as by their complaint appears, we, being willing that error, if any hath been done, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and the proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 13*rd* day of March next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the first day of February, in the year of our Lord one thousand and nine hundred.

(Seal Circuit Court of the United States, District of South Dakota, Deadwood.)

OLIVER S. PENDAR,
Clerk of the Circuit Court of the United States for the District of South Dakota,
By C. A. COE, *Deputy.*

Allowed:
LEVI McGEE,
Presiding Judge of the Circuit Court of the State of South Dakota in and for Pennington County.

9 & 10 [Endorsed:] United States of America. Writ of error. Filed Feb'y 1st, 1900. John P. McElroy, Jr., clerk of court.

11 At a term, to wit, the November, A. D. 1899, term of the circuit court of Pennington county, in the State of South Dakota, held at the court-room of the city of Rapid City, South Dakota, on the 23rd day of January, A. D. 1900.

Present: The Honorable Levi McGee, circuit judge, presiding.

PATRICK B. McCARTHY, Plaintiff,
vs.
EDWARD W. SPEED, as Administrator of William B. Franklin, Deceased; Cora C. Stone, as Heir-at-law of said William B. Franklin, Deceased; Georgia B. Bierman, as Sole Devisee and Heir-at-law of Jennie E. Franklin, Deceased; Alvah F. Fay, as Executor of the Last Will of said Jennie E. Franklin, Deceased; Thomas C. Blair, Albert Amsbury; John S. George, George E. Yost, and Philip M. Ranney, as Executors of the Last Will and Testament of John J. Fayel, Deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, Her Guardian, as Heirs-at-law and Successors in Interest of John J. Fayel, Deceased, Defendants. } Order.

Upon motion of Messrs. Fowler & Whitfield, attorneys for the defendants, and upon filing the petition for a writ of error and an assignment of errors—

It is ordered that a writ of error be, and hereby is, allowed to have reviewed by the Supreme Court of the United States the judgment heretofore entered herein, and that the amount of bond upon said writ of error be, and the same is hereby, fixed at the sum of one thousand dollars.

LEVI McGEE,
Presiding Judge of the Circuit Court of the State of South Dakota within and for Pennington County, South Dakota.

Order Book 1, page 298.

12 [Endorsed:] Circuit court, Pennington county, South Dak. Patrick B McCarthy, plaintiff, *vs.* Edward W. Speed, as administrator of the estate of William B. Franklin, deceased, *et al.*, defendants. Order fixing amount of bond and order allowing writ of error. Fowler & Whitfield, attorneys for defendants.

13 In the Supreme Court of the United States.

EDWARD W. SPEED, as Administrator of the Estate of William B. Franklin, Deceased; Cora C. Stone, as Heir at-law of said William B. Franklin, Deceased; Georgia B. Bierman, as Sole Devisee and Heir-at-law of Jennie E. Franklin, Deceased; Alvah F. Fay, as Executor of the Last Will of said Jennie E. Franklin, Deceased; Thomas C. Blair, Albert Amsbury; John S. George, George E. Yost, and Philip M. Ranney, as Executors of the Last Will and Testament of John J. Fayel, Deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, Her Guardian, as Heirs-at-law and Successors in Interest of said John J. Fayel, Deceased, Plaintiffs in Error,
against
PATRICK B. McCARTHY, Defendant in Error.

Know all men by these presents that we, James Halley and Herbert W. Somers, all of the county of Pennington and the State of

South Dakota, are held and firmly bound unto the above-named defendant in error, Patrick B. McCarthy, in the full and just sum of one thousand dollars, to be paid to the said Patrick B. McCarthy, his certain attorney, executor, administrator, or assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of — heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated 23rd day of January, in the year of our Lord one thousand and nine hundred.

14 Whereas the above-named Edward W. Speed, as administrator of the estate of William B. Franklin, deceased; Cora C. Stone, as heir-at-law of said William B. Franklin, deceased; Georgia B. Bierman, as sole devisee and heir-at-law of Jennie E. Franklin, deceased; Alvah F. Fay, as executor of the last will of said Jennie E. Franklin, deceased; Thomas C. Blair, Albert Amsbury; John S. George, George E. Yost, and Philip M. Ranney, as executors of the last will and testament of John J. Fayel, deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, her guardian, as heirs-at-law and successors in interest of said John J. Fayel, deceased, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court in and for the county of Pennington and State of South Dakota:

Now, therefore, the condition of this obligation is such that if the above Edward W. Speed, as administrator of the estate of William B. Franklin, deceased; Cora C. Stone, as heir-at-law of said William B. Franklin, deceased; Georgia B. Bierman, as sole devisee and heir-at-law of Jennie E. Franklin, deceased; Alvah F. Fay, as executor of the last will of said Jennie E. Franklin, deceased; Thomas C. Blair, Albert Amsbury; John S. George, George E. Yost, and Philip M. Ranney, as executors of the last will and testament of John J. Fayel, deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, her guardian, as heirs-at-law and successors in interest of said John J. Fayel, deceased, shall prosecute their said writ of error to effect and answer all costs if they shall fail to make their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

JAMES HALLEY.
HERBERT W. SOMERS.

Sealed and delivered in presence of two witnesses:
FRED H. WHITFIELD,
J. H. GALE, *Witnesses.*

15 STATE OF SOUTH DAKOTA, } *ss:*
County of Pennington, }

James Halley and Herbert W. Somers, being duly and separately sworn, on oath doth each for himself depose and say that he is worth the sum of $2,000 over and above all his just debts, liabilities, and exemptions.

JAMES HALLEY.
HERBERT W. SOMERS.

Subscribed and sworn to before me this 23rd day of January, A. D. 1900.

[Seal of Fred. H. Whitfield, Notary Public, South Dakota.]

FRED H. WHITFIELD,
Notary Public for Pennington County, South Dakota.

Approved:

LEVI McGEE,
Presiding Judge of the Circuit Court of State of South Dakota in and for Pennington County.

Order Book 1, pages 299 & 300.

16 [Endorsed:] In the Supreme Court of the United States. —— ——, plaintiffs in error, *vs.* —— ——, defendant in error. Bond.

17 STATE OF SOUTH DAKOTA:

Circuit Court in and for Pennington County.

PATRICK B. McCARTHY, Plaintiff,
vs.
EDWARD W. SPEED, as Administrator of the Estate of William B. Franklin, Deceased; Cora C. Stone, as Heir-at-law of said William B. Franklin, Deceased; Georgia B. Bierman, as Sole Devisee and Heir-at-law of Jennie E. Franklin, Deceased; Alvah F. Fay, as Executor of the Last Will of said Jennie E. Franklin, Deceased; Thomas C. Blair, Albert Amsbury; John S. George, George E. Yost, and Philip M. Ranney, as Executors of the Last Will and Testament of John J. Fayel, Deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, Her Guardian, as Heirs-at-law and Successors in Interest of said John J. Fayel, Deceased, Defendants. } Assignment of Errors.

The defendants in this action, Edward W. Speed, as administrator of the estate of William B. Franklin, deceased; Cora C. Stone, as heir-at-law of said William B. Franklin, deceased; Georgia B. Bierman, as sole devisee and heir-at-law of Jennie E. Franklin, deceased; Alvah F. Fay, as executor of the last will of said Jennie E. Franklin, deceased; Thomas C. Blair, Albert Amsbury; John S. George, George E. Yost, and Philip M. Ranney, as executors of the last will and testament of John J. Fayel, deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, her guardian, as heirs-at-law and successors in interest of said John J. Fayel, deceased, in connection with their petition for a writ of error, make the following assignment of errors which they aver occurred upon the trial and in the decision of this cause, to wit:

First. That the said circuit court of Pennington county in
18 rendering and entering said judgment and the supreme court of the State of South Dakota in determining the said cause and directing the entry of said judgment erred in this, to wit, that although in the pleadings in said cause and upon the trial thereof in said circuit court of Pennington county and in the supreme court of the State of South Dakota it was contended by the defendants that the mining claim known as the Tin Bar No. 1 Lode claim was void under the statutes of the United States relating to mineral claims, because, as the fact is and as appears in the findings of fact herein at the time of the attempted location of the said claim known as the Tin Bar No. 1 Lode claim, the alleged discovery point on said Tin Bar No. 1 Lode claim was within the boundaries of a then subsisting valid placer mining claim known as the Reed placer mining claim, yet the said circuit court of Pennington county and the said supreme court of the State of South Dakota decided against the said contention of these defendants, and said judgment depends upon and is based on said decision.

Second. That the said circuit court of Pennington county in rendering and entering said judgment and the said supreme court of the State of South Dakota in determining said cause and directing the entry of said judgment erred in this, to wit, that although in the pleadings in said cause and upon the trial thereof in said circuit court of Pennington county and in the supreme court of the State of South Dakota it was contended by the defendants *and* upon the trial of said cause in the said circuit court of Pennington county and the said supreme court of the State of South Dakota it was found and determined that upon the facts found and determined in said cause a portion of the land embraced in the Tin Bar No. 1 Lode claim and the Tin Bar No. 2 Lode claim was at the time of
19 the attempted location of said lode claims within the limits of a prior valid placer mining claim known as the Reed placer mining claim, and it was contended by these defendants that upon the facts so as aforesaid found in said cause, under the statutes of the United States relating to mining claims, the said Tin Bar No. 1 Lode claim and Tin Bar No. 2 Lode claim were void in so far and to the extent that they embraced lands included within the said Reed placer mining claim, yet the said circuit court of Pennington county and the said supreme court of the State of South Dakota decided against the said contention of these defendants, and said judgment depends upon and is based on said decision.

Third. That the said circuit court of Pennington county in rendering and entering said judgment and the said supreme court of the State of South Dakota in determining said cause and directing the entry of said judgment erred in this, to wit, that although in the pleadings in said cause and that upon the trial thereof in said circuit court of Pennington county and in the supreme court of the State of South Dakota it appeared and was averred and so determined and appears in the findings of said fact herein that at a date prior to the time of the application for patent to the said Reed

placer mining claim, to wit, the 23rd of November, 1892, there were no known lodes or veins upon said Reed placer mining claim within the boundary lines of said Tin Bar No. 1 or Tin Bar No. 2 locations of such a character as to render the ground more valuable because of their presence, or to justify the expenditure of money for either exploration or development; that no adverse — was filed by the owners of said Tin Bar No. 1 or Tin Bar No. 2 locations to the said application for patent for the said Reed placer mining claim; that in said application for patent for the said Reed placer mining claim there was no application for patent for any lode or veins included therein, and it was contended by these defendants in the
20 said circuit court of Pennington county and in the said supreme court of the State of South Dakota that under the statutes of the United States relating to mining claims, by reason of said facts and of the making of the final entry of the said Reed placer mining claim and the issuing of the patent therefor, all rights of the owners of the said Tin Bar No. 1 Lode claim and Tin Bar No. 2 Lode claim become and were barred and lost, yet the said circuit court of Pennington county and the said supreme court of the State of South Dakota decided against said contentions of these defendants, and said judgment depends upon and is based upon said decision.

Fourth. That the said circuit court of Pennington county in rendering and entering said judgment and the said supreme court of the State of South Dakota in determining said cause and directing the entry of said judgment erred in this, to wit, that although in the pleadings in said cause it was alleged and upon the trial thereof in said court of Pennington county and in the said supreme court of the State of South Dakota it appeared and was found as a fact in the cause that the persons who attempted to locate the said Tin Bar No. 1 Lode claim and the said Tin Bar No. 2 Lode claim failed and neglected to perform the work on the mining claims required by the statutes of the United States relating to mining claims, and it was contended by these defendants that under the statutes of the United States relating to mining claims, by reason of the failure of the locators of said Tin Bar No. 1 Lode claim and Tin Bar No. 2 Lode claim to perform thereon the work required by the statutes of the United States, the said Tin Bar No. 1 Lode claim and Tin Bar No. 2 Lode claim had become and were abandoned, null and of no effect, prior to the location of the Holy Terror Lode claim and prior to the location of the Keystone No. 4 Lode claim, yet the said circuit court of Pennington county and the said supreme — of the State of South
21 Dakota decided against said contention of these defendants, and that said judgment depends upon and is based upon said decision.

Fifth. That the said circuit court of Pennington county and the said supreme court of the State of South Dakota erred in holding and deciding, contrary to the contention of said defendants then and there made, that under said statutes of the United States the location of said Holy Terror Lode claim was invalid as against the grantor of the plaintiff.

Sixth. The said circuit court of Pennington county and the said supreme court of the State of South Dakota erred in holding and deciding, contrary to the contention of said defendants then and there made, that under said statutes of the United States the location of said Keystone No. 4 Lode claim was invalid as against the grantor of the plaintiff.

Seventh. That the said circuit court of Pennington county and the said supreme court of the State of South Dakota erred in holding and deciding, contrary to the contention of said defendants then and there made, that under the said statutes of the United States the said Tin Bar No. 1 Lode claim was at the time of the location of the Holy Terror Lode claim a valid and subsisting mining claim.

Eighth. That the said circuit court of Pennington county and the said supreme court of the State of South Dakota erred in holding and deciding, contrary to the contention of the said defendants then and there made, that at the time of the location of the said Keystone No. 4 Lode claim the said Tin Bar No. 2 Lode claim was under said statutes of the United States a valid and subsisting mining claim.

Ninth. That the said circuit court of Pennington county and the said supreme court of the State of South Dakota erred in holding and deciding, contrary to the contention of the said de-
22 fendants then and there made, that upon the facts found and determined in said cause the plaintiff is the owner of a $\frac{1}{8}$ interest in and to so much of the ground covered by the Holy Terror Lode mining claim as is embraced within the boundaries of the Tin Bar No. 1 Lode claim or is the owner of any interest whatever in any of the ground covered by the said Holy Terror Lode mining claim.

Tenth. That the said circuit court of Pennington county and the said supreme court of the State of South Dakota erred in holding and deciding, contrary to the contention of the said defendants then and there made, that upon the facts found and determined in said cause the said plaintiff is the owner of a $\frac{1}{8}$ interest in so much of the ground covered by the Keystone No. 4 Lode mining claim as is embraced within the boundaries of the Tin Bar No. 2 Lode mining claim or is the owner of any interest whatever in any portion of the ground covered by the said Keystone No. 4 Lode mining claim.

Eleventh. That the said circuit court of Pennington county, in rendering and entering said judgment, and the said supreme court of the State of South Dakota, in determining said cause and directing the entry of said judgment, erred in this, to wit: That although in the pleadings in said cause and upon the trial thereof in said circuit court of Pennington county and in the supreme court of the State of South Dakota it was contended by the defendants and upon the trial of said cause in said circuit court of Pennington county and said supreme court of the State of South Dakota it was found and determined in said cause that the land embraced within the exterior boundary lines of the said Holy Terror mining claim, together with all valuable mineral deposits contained therein, was, on the 28th day of June, 1894, the day of its location, open to loca-

tion, occupancy, and purchase by any citizen of the United
23 States or any person who had declared his intention to
become such citizen, and William B. Franklin, being such citizen and having made compliance in other respects with the acts of Congress with reference to the occupancy and purchase of mineral lands of the United States, became the owner thereof and the plaintiff had no interest in such location and now has no interest therein, yet the said circuit court of Pennington county and the said supreme court of the State of South Dakota decided against the said contention of these defendants, notwithstanding the facts so found and determined in said cause, and said judgment depends upon and is based upon such decision.

Twelfth. That the said circuit court of Pennington county, in rendering and entering said judgment, and the said supreme court of the State of South Dakota, in determining said cause and directing the entry of said judgment, erred in this, to wit: That although in the pleadings in said cause and upon the trial thereof in said circuit court of Pennington county and in the supreme court of the State of South Dakota it was contended by the defendants and upon the trial of said cause — circuit court of Pennington county and said supreme court of the State of South Dakota it was found and determined in said cause that the land embraced within the exterior boundary lines of the said Keystone No. 4 Lode mining claim, together with all the valuable mineral deposits contained therein, was, at the time of its location, open to occupancy, location, and purchase by any citizen of the United States or any person who had declared his intention to become such citizen, and William B. Franklin, Thomas C. Blair, and Jacob F. Reed, being such citizens and having made compliance in other respects with the acts of Congress with reference to the occupancy and purchase of mineral lands of the United States, became the owners of said mining
24 claim and the said mining claim now is and has been, since the 20th day of September, 1894, a valid and subsisting mining claim and the plaintiff had no interest or estate in said location and now has no interest therein, yet the said circuit court of Pennington county and the said supreme court of the State of South Dakota decided against the said contention of these defendants, notwithstanding the facts so found and determined in said cause, and said judgment depends upon and is based upon such decision.

Thirteenth. That the said circuit court of Pennington county and the said supreme court of the State of South Dakota erred in rendering judgment upon the facts found and determined in said cause in favor of the plaintiff and against the said defendants.

Wherefore the said Edward W. Speed, as administrator of the estate of William B. Franklin, deceased; Cora C. Stone, as heir-at-law of said William B. Franklin, deceased; Georgia B. Bierman, as sole devisee and heir-at-law of Jennie E. Franklin, deceased; Alvah F. Fay, as executor of the last will of said Jennie E. Franklin, deceased; Thomas C. Blair, Albert Amsbury, John S. George, George E. Yost, and Philip M. Ranney, as executors of the last will and

testament of John J. Fayel, deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, her guardian, as heirs-at law and successors in interest of said John J. Fayel, deceased, pray that the judgment of the said circuit court in and for Pennington county and State of South Dakota be reversed, and the said circuit court be ordered to enter a judgment in said cause dismissing the complaint of the said Patrick B. McCarthy and adjudge that the defendants are the holders and owners of the land, premises, and mining claims in question free and clear from any
25 claim of the said Patrick B. McCarthy thereto.

FOWLER & WHITFIELD,
CHARLES QUARLES,
Attorneys for Plaintiffs in Error.

26 [Endorsed:] In the circuit court in and for Pennington county, State of South Dakota. —— ——, plaintiff, *vs.* —— ——, defendants. Assignment of errors.

27 STATE OF SOUTH DAKOTA:

Circuit Court in and for Pennington County.

PATRICK B. McCARTHY, Plaintiff,
vs.
EDWARD W. SPEED, as Administrator of the Estate of William B. Franklin, Deceased; Cora C. Stone, as Heir-at-law of said William B. Franklin, Deceased; Georgia B. Bierman, as Sole Devisee and Heir-at-law of Jennie E. Franklin, Deceased; Alvah F. Fay, as Executor of the Last Will of said Jennie E. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, John S. George, George E. Yost, and Philip M. Ranney, as Executors of the Last Will and Testament of John J. Fayel, Deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, Her Guardian, as Heirs-at-law and Successors in Interest of John J. Fayel, Deceased, Defendants.

Petition.

Now comes Edward W. Speed, as administrator of the estate of William B. Franklin, deceased; Cora C Stone, as heir-at-law of said William B. Franklin, deceased; Georgia B. Bierman, as sole devisee and heir-at-law of Jennie E. Franklin, deceased; Alvah F. Fay, as executor of the last will of said Jennie E. Franklin, deceased; Thomas C. Blair, Albert Amsbury, John S. George, George E. Yost, and Philip M. Ranney, as executors of the last will and testament of John J. Fayel, deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, her guardian, as heirs-at-law and successors in interest of said John J. Fayel, deceased, defendants herein, and say:

That on the 13th day of January, A. D. 1900, this court, pursuant to and in accordance with the judgment and mandate of the
28 supreme court of said State of South Dakota, entered judgment herein in favor of the plaintiff and against these de-

fendants, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of these defendants, all of which will more in detail appear from the assignment of errors, which is filed with this petition.

Wherefore these defendants pray that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court.

FOWLER & WHITFIELD,
CHARLES QUARLES,
Attorneys for Defendants.

29 [Endorsed:] In the circuit court in and for Pennington county, State of South Dakota. —— ——, plaintiff, *vs.* —— ——, defendants. Petition. Filed January 23rd, 1900. John P. McElroy, Jr., clerk of courts. # 1226.

30 In the Circuit Court of the Seventh Judicial Circuit *Court* of the State of South Dakota in and for Pennington County.

PATRICK B. MCCARTHY, Plaintiff,
vs.
WILLIAM B. FRANKLIN, THOMAS C. BLAIR, ALBERT Almsbury, and John J. Fayel, Defendants. } Summons.

The State of South. Dakota sends greeting to the above-named defendants:

You are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, which was filed in the office of the clerk of the above-entitled court in and for said county and State on the 12th day of April, A. D. 1895, and to serve a copy of your answer upon the subscriber at his law office, in the city of Rapid City, South Dakota, within thirty days after the service of this summons upon you, exclusive of the day of such service, and if you fail to answer said complaint within that time the plaintiff will apply to the court for the relief demanded in the complaint, besides the costs and disbursements of this action.

Dated at Rapid City, South Dakota, this 12th day of April, 1895.

CHARLES W. BROWN,
Plaintiff's Attorney.

31 In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota in and for Pennington County.

PATRICK B. McCARTHY, Plaintiff,
vs.
WILLIAM B. FRANKLIN, THOMAS C. BLAIR, ALBERT Almsbury, and John J. Fayel, Defendants. } Complaint.

The plaintiff complains and alleges:

I.

That the plaintiff and the defendants and all of their predecessors in interest in the property hereinafter described are now and were at all the times hereinafter mentioned citizens of the United States, each over the age of twenty-one years.

II.

That the plaintiff is now and for a long time hitherto has been the owner against all persons except as against the United States and entitled to the possession of the following-described real property and mining claims, situated in said Pennington county, to wit: An undivided one-fourth interest in and to that certain mining claim known as the Holy Terror Lode claim, recorded in the office of the register of deeds in and for said Pennington county, recorded in Book "16" of location certificates, on page 128 thereof, and situated in the Cross mining district, in said county, and being bounded on the east by the Keystone No. 1 Lode claim and on the west by the Keystone No. 4 Lode claim and on the south by the Reed placer claim, the same being a patented claim and known as M. C. No. 903, and said Holy Terror Lode claim being about five hundred feet east of U. S. L. M. No. 29 and extending along the vein of said Holy Terror lode five hundred feet southeasterly from the
32 discovery shaft and notice and one thousand feet northwesterly from said discovery shaft and notice and one hundred and fifty feet on each side of the middle of the vein.

Also an undivided one-fourth interest in and to those certain mining claims situated in Cross mining district, in said Pennington county, and known as the Keystone No. 3 Lode claim and Keystone No. 4 Lode claims, being and situated on the west side of Battle creek, in said county, and recorded in the office of the register of deeds of said Pennington county, in Book "17" of Location Certificates, on pages 638 and 639 thereof, said Keystone No. 3 lode being bounded on the east by the Keystone No. 1 lode and on the south by the Reed placer claim, a patented claim being known as M. C. No. 903, and on th- west by Keystone No. 4 Lode claim, a fractional lode claim, and said Keystone No. 4 Lode claim being bounded on the east by the Keystone No. 3 lode, with which it is parallel, and on the south by the Reed placer claim, a patented claim known as M. C. No. 903, and said Keystone No. 4 Lode claim extending along the vein thereof thirteen hundred and fifty feet northwesterly from the center of the discovery shaft and notice, and one hundred and

fifty feet southeasterly from said discovery shaft and notice, and one hundred and fifty feet on each side of the middle of the vein, said Holy Terror Lode claim and said Keystone No. 3 Lode claim and said Keystone No. 4 Lode claims being formerly located and known as the Tin Bar No. 1 Lode claim and the Tin Bar No. 2 Lode claim, recorded in the office of the register of deeds of said Pennington county, in Book "J" of Location Certificates, on pages 28 and 29 thereof.

III.

That the defendants and each of them claim an estate and interest in and to the said undivided one-fourth interest in and to the said Holy Terror Lode claim, and the said Keystone No. 3 Lode claim, and the said Keystone No. 4 Lode claim adverse to the plaintiff.

33

IV.

At the said claim of the said defendants and each of them is without any right whatever, and that the defendants or either of them have not any estate, right, title, or interest whatsoever in or to the said undivided one-fourth interest of this plaintiff in said lode claims.

Wherefore the plaintiff prays that the defendants be required to set forth the nature of their respective claims, and that all adverse claims of the defendants may be determined by decree of this court; that by said decree it be declared and adjudged that the defendants have no estate or interest whatsoever in or to the plaintiff's said undivided one-fourth interest and estate in said lode claims, and that the said title of the plaintiff is good and valid; that the defendants, each of them, be forever enjoined and debarred from asserting any claim whatsoever in or to the plaintiff's said undivided one-fourth interest and estate in said premises adverse to the plaintiff, and for such other or further relief as may be just and equitable, and for the costs and disbursements of this action.

CHARLES W. BROWN,
Plaintiff's Attorney.

STATE OF SOUTH DAKOTA, } ss:
Pennington County, }

Patrick B. McCarthy, being first duly sworn, says that he is the plaintiff in the action entitled in the foregoing complaint; that he has read said complaint and understands the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

PATRICK B. McCARTHY.

Subscribed and sworn to before me this 11th day of April, 1895.

[SEAL.] JAMES R. SHARP,
Notary Public.

34 In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota in and for Pennington County.

PATRICK B. McCARTHY, Plaintiff, *vs.* EDWARD W. SPEED, as Administrator of the Estate of William B. Franklin, Deceased; Jennie E. Franklin and Cora C. Stone, as Heirs-at-law of said William B. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, and John J. Fayel, Defendants.	Amended Answer.

Now come the defendants, by leave of court first had and obtained, and made and serve their amended answer to the plaintiff's complaint in this action, and for such amended answer say and allege:

First. For a first defense:

I. That they admit that the defendants Thomas C. Blair, Albert Amsbury, and John J. Fayel are now and were at all the times mentioned in the complaint citizens of the United States, over the age of twenty-one years, and that William B. Franklin was a citizen of the United States, over the age of twenty-one years, at and prior to the time of his death, and that the defendants herein have and claim an interest and estate in and to the Holy Terror Lode claim. They also admit that they have and claim an interest or estate in and to the Keystone No. 4 Lode claim, as relocated and amended on the 17th day of August, 1894, and as the said claim is now staked upon the ground in accordance with said amended location.

II. They specifically deny each and every allegation and averment in said complaint not hereinbefore specifically admitted.

Second. For a second defense:

I. That Emma O'Keefe, residing at Keystone, South Da-
35 kota, and Alice Shoemaker, residing in Garfield county, Nebraska, are tenants in common with the above-named defendants of the mining claims and real property in controversy in this action, and that these defendants and the said Emma O'Keefe and Alice Shoemaker and the Holy Terror Mining Company *at* the sole and exclusive owners of the said mining property and the whole thereof, and that the said Emma O'Keefe and Alice Shoemaker are necessary parties to this action.

Third. For a third defense:

1. These defendants allege upon information and belief that the plaintiff expects and intends to establish his allegations of ownership or estate in and to the said Holy Terror Lode claim set forth in his complaint by proving or attempting to prove upon the trial of this case that the land now covered by the said Holy Terror Lode claims or some portion thereof was formerly located on the 25th day of January, 1888, under and by the name of the Tin Bar No. 1 Lode claim by Jacob F. Reed, William Franklin, Thomas C. Blair, and Frank Eaton, and by proving or attempting to prove that the plaintiff thereafter acquired some interest or estate in and to the said Tin Bar No. 1 location and thereby became a tenant in com-

mon of said claim with the other locators thereof, and by proving or attempting to prove that the said Tin Bar No. 1 location was at all times thereafter a valid and subsisting mining location and was a valid and subsisting mining location at the time of the location of the said Holy Terror Lode claim, to the extent at least that the plaintiff is vested with some interest or estate in and to said subsequent location.

2. These defendants allege that if the said Tin Bar No. 1 Lode claim was a valid and subsisting lode claim in its inception, which the defendants deny, that no assessment or development work was ever done by the locators and owners thereof or any one for them during any years subsequent to the said pretended location
36 in the year 1888, and that the said pretended Tin Bar No. 1 Lode claim and the whole thereof was forfeited and abandoned at and prior to the location of the said Holy Terror Lode claim on the 28th day of June, 1894, as hereinafter alleged.

3. That the said locators and owners of the said pretended Tin Bar No. 1 Lode claim failed to do the assessment or development work thereon required by law for the years 1889, 1890, 1891, and 1892 and 1893 and abandoned the same, and thereafter the defendant William Franklin peaceably entered upon the said ground and duly made a discovery thereon of mineral-bearing rock in place carrying gold and other valuable minerals; and on or about the 28th day of June, 1894, by the name of William B. Franklin, he duly located and appropriated the same under and by the name of the Holy Terror Lode claim, and thereafter marked the surface boundaries of the same upon the ground with eight substantial stakes, as required by law, and duly recorded the location certificate thereof in the office of the register of deeds in and for Pennington county, South Dakota, and did and performed all the said acts of location within sixty days after the date of his said discovery and within the time required by law; that the other defendants herein have since acquired an interest in and to the said Holy Terror location by purchase from the said William Franklin.

Fourth. For a fourth defense:

1. These defendants allege upon information and belief that the plaintiff expects and intends to establish his allegations of ownership and estate in and to the said Keystone No. 4 Lode claim set forth in his complaint by proving or attempting to prove upon a trial of this case that the land now covered by the said Keystone No. 4 Lode claim or some portion thereof was formerly located, on or about the 25th day of January, 1888, under and by the name of the Tin Bar No. 2 Lode claim, by Thomas C. Blair and Frank Eaton, and by proving or attempting to prove that the plain-
37 tiff thereafter acquired some interest or estate in or to said Tin Bar No. 2 Lode claim, and thereby became a tenant in common of said claim with the other locators thereof, and by proving or attempting to prove that said Tin Bar No. 2 location was at all times thereafter a valid and subsisting mining location, and was a valid and subsisting mining location at the time of the location of the said Keystone No. 4 location, to the extent at least that the

plaintiff is vested in some interest or estate in or to said Keystone No. 4 Lode claim.

2. These defendants alledge that if the said Tin Bar No. 2 Lode claim was a valid and subsisting location in its inception, which the defendants deny, that no assessment or development work was done thereon by the locators or owners *thereon* or by any one for them during any years subsequent to its pretended location, and that the said pretended Tin Bar No. 2 Lode claim and the whole thereof was forfeited and abandoned at and prior to the location of the said Keystone No. 4 Lode claim, on the 13th day of March, 1892, and hereinafter alleged.

3. That the said locators and owners of the said pretended Tin Bar No. 2 Lode claim failed to do the required assessment or development work, as required by law, for the years 1889, 1890, and 1891 and abandoned the same, and thereafter the defendants William Franklin, Thomas C. Blair, and one Jacob F. Reed peaceably entered upon said ground, and on the 13th day of March, 1892, duly made a discovery thereon of mineral-bearing rock in place carrying gold and other valuable minerals, and then and there duly located and appropriated the same under and by the name of the Keystone No. 4 Lode claim, and that they marked the surface boundaries of the same upon the ground with eight substantial stakes, as required by law, and duly recorded a location certificate thereof in the office of the register of deeds in and for Pennington county, South Dakota, and did and performed all the acts of location within sixty days after their said discovery and within the time prescribed by
38 law; that the other defendants herein have since acquired an interest or estate in and to said Keystone No. 4 location by purchase from the other locators thereof.

Wherefore these defendants demand judgment that the complaint may be dismissed upon its merits and for the costs of this action, and for general relief.

JAMES W. FOWLER AND
TEMPLE AND GARDNER,
Attorneys for Defendants.

STATE OF SOUTH DAKOTA, } ss:
County of Pennington, }

John J. Fayel, of lawful age, being first duly sworn, deposes and says that he is one of the above-named defendants; that he has read the above and foregoing amended answer and understands the contents thereof, and that the same is true of his own personal knowledge except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

JOHN J. FAYEL.

Subscribed and sworn to before me this 17th day of December, 1895.

[SEAL.] ——— ———,
Notary Public.

39 In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota in and for Pennington County.

PATRICK B. McCARTHY, Plaintiff,
vs.
WILLIAM B. FRANKLIN, THOMAS C. BLAIR, ALBERT AMSBURY, and John J. Fayel, Defendants.

In this case the plaintiff, who heretofore became the owner by purchase of an undivided eighth interest in the Tin Bar No. 1 and Tin Bar No. 2 mining claims, seeks to recover an undivided one-eighth interest in the Holy Terror and Keystone No. 4 claims.

It appears that on September 16, 1882, Jacob F. Reed and William B. Franklin located the Reed placer in conformity to the laws of the United States. The validity of that location is not called in question. Application for patent of the Reed placer was made on November 23, 1892, and final entry on March 13, 1893. In the application for patent no mention was made of any lodes or veins included within the placer.

On January 25, 1888, Jacob F. Reed, William B. Franklin, and others went upon the Reed placer and made an alleged discovery of a lode of tin bearing rock in place, and if the discovery was valid performed all the necessary acts of location. This claim was christened the Tin Bar No. 1. At the same time similar acts of location were performed by the same parties upon the Tin Bar No. 2, except that the alleged discovery upon the latter claim was beyond the limits of the Reed placer. I do not deem it necessary to determine the disputed question whether or not tin bearing rock in place was found upon either of these claims. Assessment-work of only nominal value was in any year performed in any year upon the Tin Bar claims.

40 In March 13, 1892, William B. Franklin, Jacob F. Reed, and Thomas C. Blair located the Keystone No. 4 claim, beyond the limits of the Reed placer, but including a portion of the Tin Bar No. 2. On June 28th, 1894, Franklin located the Holy Terror claim, likewise beyond the boundaries of the Reed placer, but including a portion of the Tin Bar No. 1. In 1888, shortly after the location of the Tin Bar No. 1 and 2, the plaintiff purchased an undivided one-eighth interest in the claims. He insists that although less than one hundred dollars' worth of *alluan* assessment-work was done upon each of the Tin Bar claims, and though they were confessedly open to relocation by a stranger, yet Reed and Franklin, being joint tenants with him in the old location, could not relocate the ground as forfeited and leave him out, but that, if they did so relocate it, they must hold the new claims as trustees for him to the extent of his interest in the old claims.

This raises two questions of great practical importance to the miner and by no means free from doubt to the lawyer: 1st, Can a lode claim be located over a placer between the date of the placer location and the application for patent? and, 2nd, Can one or more of the cotenants of an unpatented claim which has been forfeited

by non-performance of the annual assessment work relocate the claim for his own sole benefit, there being no proof of fraud?

Upon the first question my judgment is that the location of a placer claim completely segregates the area within it from the public domain, and thereafter, until some act or omission occurs which strips the placer claimant of his exclusive right, the claim and all that is in it is private property. If it contains a lode which is unknown, his placer patent carries it; if it contains a lode which is known, he has a right to a patent to it, provided he comply with the law in making his application and pay the purchase price. No new acts of location of the lode are required. Clearly the placer claimant has until he makes application for patent to elect
41 whether he will demand patent for the included lode, and his rights to lode and placer seem of equal dignity and of one origin until by failure to claim patent for a known lode within his ground the placer claimant renounces all right to such lode his right to the placer and all lodes within it is good as against all the world, the United States excepted. After failure to include a known lode within the application for a patent he is presumed to have abandoned it, and it is open to location, the burden being upon the new locator to establish the fact that the lode was known.

Upon the second question my judgment is that during the life of a mining claim the cotenants occupy a trust relation to each other. While the joint estate continues equity will not permit one tenant to undermine or destroy the title of his co-owners, and any new title acquired by him to the joint estate is conclusively presumed to be for the benefit of all. However, when forfeiture occurs joint tenancy and all tenancy ends, for the estate itself has perished. Having ceased to exist, no trust relation can be said to bind it. It has no quality in limitations, because it has no existence. It is not a trust estate or any estate, but reverts to the United States and resumes its old character of public domain, with all the characteristics and attributes thereof. If the claim were alive and it were desired to deprive one of the cotenants therein for failure to bear his equitable portion of the burden of maintaining the claim, clear*ing* this can be done only in the manner provided by the statute; but in case of forfeiture all the cotenants loose their estate, which reverts to the grantor. I know of no principle of equity or rule of law which forbids a part of such cotenants from taking a new and original grant of the tract included within the old claim. To hold otherwise will impress upon every foot of the unoccupied mineral lands a trust character the moment two or more prospectors post a notice or drive a stake upon it, and such trust character will follow these claims for an apparently indefinite period, leading to
42 endless embarrassment and confusion to a class of rights already sufficiently uncertain.

For all the reasons above recited the judgment of the court is for the defendants upon all the issues.

Dated January 22, 1896.

WILLIAM GARDNER, *Judge.*

43 In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota within and for Pennington County.

PATRICK B. McCARTHY, Plaintiff,
vs.
EDWARD W. SPEED, as Administrator of the Estate of William Franklin, Deceased; Jennie E. Franklin and Cora C. Stone, as Heirs-at-law of said William Franklin, Deceased; Thomas C. Blair, Albert Amsbury, and John J. Fayel, Defendants. } Decision.

This action coming on regularly for trial at the adjourned November, 1895, term of said court, and being tried to the said court without a jury on the 17th day of January, A. D. 1896, the same being a day of the said adjourned term of court, the plaintiff appearing in person and by his attorneys, Messrs. William McLaughlin and Charles W. Brown and William H. Mitchell, and the defendants appearing by their attorneys, James W. Fowler, Esq., and Messrs Temple and Gardner, and the court having heard the evidence adduced and the argument of counsel and being fully advised in the premises and having announced his decision in favor of the defendants and against the plaintiff upon all the issues, now makes and files the following findings of fact and conclusions of law:

Findings of Fact.

1st. There is no proof that the plaintiff is a citizen of the United States of America, or that he was such citizen at any of the times mentioned in the complaint, or that he had declared his intention to become such.

2nd. That on the 16th day of September, 1882, a portion of the ground in controversy was located as the Reed placer mining claim by Jacob F. Reed and William Franklin, who were then and
44 there citizens of the United States over the age of twenty-one years; that said locators duly made a discovery of placer deposits of gold within the lines of said placer claim and posted a notice of location thereon and duly marked all the corners and boundaries of said placer location, as required by law, and within sixty days thereafter they filed for record in the office of the register of deeds in and for said Pennington county a location certificate for said Reed placer claim, as required by law; that all and singular the said act of location pertaining to the said Reed placer claim *were* done in the manner and form required by law; that from the date of the location of the said Reed placer claim until the year 1892 the said Jacob F. Reed and William Franklin were in the actual, notorious, and peaceable possession of said placer claim and were the acknowledged and reputed owners thereof, and during all of said years, and particularly during the year 1887, the said Jacob F. Reed and William Franklin did or caused to be done upon said placer location one hundred dollars' worth of development-work for each of said years.

3rd. By stipulation of counsel in open court, duly entered upon the minutes, it is admitted that an application was made for a patent to the Reed placer claim by the owners of the said claim on the 23rd day of November, 1892, and that final entry of same was made in the United States land office at Rapid City, South Dakota, on the 13th day of March, 1893, and that there was no application for a lode on the present cite aside from the placer patent, and the court so finds the facts in accordance with said stipulation.

4th. That the boundaries of the said Reed placer claim as patented and as shown by the plat introduced in evidence by the defendants and marked as their Ex. 2 coincides with the boundaries of the said placer claim as staked upon the ground at the time of its original location.

5th. That on the 25th day of January, 1888, Jacob F.
45 Reed, William Franklin, Thomas C. Blair, and Frank Eaton marked the boundaries of the Tin Bar No. 1 location upon the ground with stakes, as required by law, and posted a discovery or location notice thereon, and within sixty days thereafter recorded the location certificate for said Tin Bar No. 1 *location certificate* in the office of the register of deeds in and for said Pennington county, but did no other act or acts of location at the time.

6th. That the location or discovery notice of said Tin Bar No. 1 Lode claim was posted inside the boundary line of the said Reed placer claim, to wit, said notice was posted within the exterior boundary lines of said Reed placer mining claim and between one hundred — fifty and two hundred feet easterly of the nor[illegible]esterly boundary line of the said Reed placer mining claim, and t[illegible]oint claimed as discovery on the Tin Bar No. 1 claim is the same point at which the notice was posted.

7th. That the only reference to any natural objects or permanent monument in the description of the Tin Bar No. 1 location contained in the location certificate therefor is in the words and figures as follows, to wit: "Said discovery shaft being situated upon said lode within the lines of said claim in Cross mining district, county of Pennington, Territory of Dakota, and lays four hundred — to the east of the U. S. location No. 29 monument, and crosses Battle creek on the southeast end, is fully staked and marked in accordance with the United States mining laws."

8th. That no labor has been performed upon or improvement made upon said Tin Bar No. 1 location, except about four days' work in 1889 and about four days' work in 1891, such work being of the value of not exceeding $14.00 in each of said years 1889 and 1891.

9th. That there was no agreement on the part of the defendants Thomas C. Blair and William Franklin or either of them with the plaintiff to perform any labor or to make any improvement on said Tin Bar No. 1 location from the year 1893 or 1894, and no contractual relations existed between said parties in regard to
46 said Tin Bar No. 1 location at the time of the location of the Holy Terror Lode claim on the 28th day of June, 1894.

10th. That on the 25th day of January, 1888, Thomas C. Blair and Frank Eaton marked the boundaries of the Tin Bar No. 2 loca-

tion upon the ground with eight substantial posts or stakes, and posted a location notice upon the said claim, and within sixty days thereafter rec*l*reded a location certificate for the same in the office of the register of deeds in and for said Pennington county, but that they did no other act or acts of location at the time.

11th. That no labor has been performed upon or improvements made upon the said Tin Bar No. 2 location, except about four days' labor performed thereon in 1891, of the value of not to exceed the sum of fourteen dollars.

12th. That there was no agreement on the part of the defendants William Franklin and Thomas C. Blair or either of them with the plaintiff to perform any labor or to make any improvements upon said Tin Bar No. 2 location for and during the years 1892, 1893, or 1894, and that there was no contractual relations between said parties with reference to said location during said years.

13th. By stipulation of counsel in open court and duly entered upon the minutes it is admitted that the Holy Terror location was properly made and was a valid location at the date of its location by the defendant William Franklin on the 28th day of June, 1894, and that the Keystone No. 4 location, from the date of the amended location certificate, to wit, the 20th day of September, 1894, was properly made and a valid location of the ground described in the amended location certificate thereof, and that the laws of this State and of the United States have been complied with so far as it relates to the said Holy Terror and Keystone No. 4 locations from the date of the location of the said Holy Terror mine and the date of the amended location of the said Keystone No. 4 Lode claims to the present time, and the court finds the facts in accordance with the stipulation.

47 14th. By stipulation of counsel in open court and duly entered in the minutes it is admitted that the defendants named in the summons and complaint were the owners of the Holy Terror and Keystone No. 4 location, save for the rights of the plaintiff in this action, and the court so finds the facts in accordance with the stipu-ation.

15th. That no adverse was filed by the plaintiff or other owners of the Tin Bar No. 1 and Tin Bar No. 2 location to the said application for patent to the said Reed placer *placer* claim.

16th. That at and prior to the time of the application for patent for said Reed placer claim, to wit, the 23rd day of November, 1892, there were no lodes or veins upon said Reed placer claim within the boundar*ies* lines of said Tin*e* Bar No. 1 and Tin Bar No. 2 location of such a character as to render the ground more valuable because of their presence, or to justify the expenditure of money for either exploitation or development.

17th. That in said application for patent to the said Reed placer claim there was no application for patent for any lodes or veins included therein.

18th. That the southeast end of the said Holy Terror Lode claim embraces a portion of the ground claimed by the plaintiff to have been formerly covered by the northwest end of the Tin Bar No. 1,

the area in conflict amounting to 1.62 acres and described as follows, to wit: Commencing at the southeast corner of the Holy Terror Lode mining claim and running thence N. 62° 12′ W. 394.6 feet; thence S. 28° 00′ W. 7 feet; thence S. 41° 05′ W. 102.1 feet; thence S. 47° 57′ E. 480 feet to the southwest corner of Holy Terror Lode mining claim; thence N. 15° 30′ E. 222.7 feet to the place of beginning.

19th. That the southeast end of the Keystone No. 4 location embraces a portion of the ground formerly embraced by the Tin Bar No. 2 location, the area in conflict amounting to 2.71 acres, and described as follows, to wit: Commencing at the southeast corner of the Keystone No. 4 Lode mining claim and running thence N. 47° 57′ W. 480 feet; thence S. 38° 06′ W. 119 feet; thence
48 S. 39° 36′ W. 92 feet; thence S. 41° 50′ E. 135.1 feet; thence S. 47° 57′ E. 446.3 feet to the southwest corner of the Keystone No. 4 Lode mining claim; thence N. 15° 30′ E. 252.6 feet to the place of beginning.

20th. That the plat introduced in evidence by the defendants marked Exhibit "2" correctly shows the position occupied on the earth's surface by the said Reed placer, Tin Bar No. 1, Tin Bar No. 2, Holy Terror, and Keystone No. 4 locations, and their relative locations to each other, and correctly shows the boundary lines of said several locations, together with the location of the stakes, notices, discovery shafts, and workings on said claims, and correctly shows the area and extent of conflict of said location with each other.

21st. That during the year 1888 Frank Eaton conveyed by deed in due form to one George W. Williams, who was a citizen of the United States, an undivided one-fourth interest of the Tin Bar No. 1 and Tin Bar No. 2 claims and other property, and during the same year said Williams executed and delivered to the plaintiff and one Michael McGuire a mining deed in due form to the said property, to wit, an undivided one-fourth interest to the Tin Bar 1 and Tin Bar 2 and other mining property not in controversy in this case, and that on April 22, 1890, said Frank Eaton conveyed to said defendant, Franklin, an undivided one-fourth interest in and to said Tin Bar 2 claim, and said Blair conveyed an undivided one-fourth interest therein to Jacob F. Reed.

22nd. That before the commencement of this action the defendants Fayel and Amsbury became the owners in said Holy Terror and said Keystone No. 4 mining claim-, and at the beginning of said action said Franklin, Blair, Fayel, and Amsbury each owned an undivided one-quarter interest in said Holy Terror Lode mining claim and an undivided seven-thirty-sixths interest in said Keystone No. 4 Lode mining claim; that said Blair acquired his interest in said Holy Terror lode with full knowledge of whatever rights the plaintiff McCarthy had, if any.

23rd. That said Blair and Franklin during the year 1891
49 discovered a well-defined ledge of mineral-bearing rock in place carrying gold upon the said Tin Bar No. 2 claim, which

said point of discovery was outside of the limits of the said Reed placer mining claim.

24th. That the location notice upon the said Tin Bar No. 1 claim was posted upon a well-defined ledge of rock in place carrying tin, but that the said plaintiff and defendants had no knowledge of the existence of tin or other valuable deposits therein until after this action was commenced, to wit, until during the trial of this case.

Conclusions of Law.

From the facts found and admitted, the court makes and files the following conclusions of law:

First.

That the land embraced within the exterior boundary lines of the Holy Terror mining claim, together with all valuable mineral deposits contained therein, was, on the 28th day of June, 1894, the date of its location, open to location, occupancy, and purchase by any citizen of the United States or any person who had declared his intention to become such citizen, and William B. Franklin, being such citizen and having made compliance in other respects with the acts of Congress with reference to the occupancy and purchase of the mineral land of the United States, became the owner thereof, and the plaintiff had no interest in such location and now has no interest therein.

Second.

That the land embraced within the exterior boundary lines of the Keystone No. 4 lode or mining claim, together with all valuable mineral deposits contained therein, was at the time of its location open to occupancy, location, and purchase by any citizen of the United States or any person who had declared his intention to become such citizen, and William Franklin, Thomas C. Blair, and Jacob F. Reed, being such citizens and having made compliance in other respects with the acts of Congress with reference to
50 the occupancy and purchase of the mineral lands of the United States, became the owners of said mining claim, and the said mining claim now is, and has been since the 20th day of September, 1894, a valid and subsisting mining claim, and the plaintiff had no interest or estate in said location and now has no interest therein.

Third.

It is only the unoccupied and unappropriated mineral lands of the United States that are open to exploration, occupancy, and purchase. The point of discovery of the Tin Bar No. 1 claim being within the exterior boundary lines of the Reed placer mining claim, the same being a valid and subsisting mining claim at the time of the attempted location of the said Tin Bar No. 1 claim, no valid discovery could be made within the lines of said placer mining claim. The acts of location of said Tin Bar No. 1 claim were as if they had not been performed, and the same never became a mining

claim within the meaning of the acts of Congress with reference to mining locations upon the public lands.

Fourth.

That the plaintiff should take nothing by this action, and that the defendants are entitled to recover of the plaintiffs their costs and disbursements herein.

Let judgment be entered accordingly.

Dated at Rapid City, So. Dakota, this 15th day of February, A. D. 1896.

By the court:

WILLIAM GARDNER, *Judge.*

51 In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota within and for Pennington County.

PATRICK B. MCCARTHY, Plaintiff,
vs.
EDWARD W. SWEED, as Administrator of the Estate of William Franklin, Deceased; Jennie E. Franklin and Cora C. Stone, as Heirs-at-law of said William Franklin, Deceased; Thomas C. Blair, Albert Amsbury, and John J. Fayel, Defendants. } Judgment.

This cause having been brought on for trial upon the issues raised by the plaintiff's complaint and the amended answer of the defendants thereto on the 17th day of January, 1896, being a day of the regular November, 1895, term of court, the plaintiff being represented by Messrs. William L. McLaughlin, Charles W. Brown, and William H. Mitchell, his attorneys, and defendants being represented by James W. Fowler, Esq., and Messrs. Temple & Gardner, their attorneys, and this cause having been tried by the court without a jury, and findings of fact and conclusions of law and a decision thereon, in writing, having been duly rendered by the court, which are now filed in this case, wherein judgment was ordered in favor of the defendants, Edward W. Speed, as administrator of the estate of William Franklin, deceased; Jennie E. Franklin and Cora C. Stone, as heirs-at-law of said William Franklin, deceased; Thomas C. Blair, Albert Amsbury, and John J. Fayel, and against the plaintiff and for costs:

Now, on motion of James W. Fowler, Esq., and Messrs. Temple & Gardner, attorneys for the defendants, it is ordered, adjudged, and decreed that the said defendants and each of them have, and they are hereby, granted judgment as prayed for in their amended answer to the plaintiff's complaint herein, and that all adverse claim or claims of the plaintiff and of all persons claiming or to
52 claim the said premises described in the complaint herein or any part thereof through or under the said plaintiff are hereby adjudged and decreed to be invalid and groundless, and that the said defendants be, and they hereby are, declared and adjudged to

be the true and lawful owners of the said mining claims described in the plaintiff's complaint herein and hereinafter described and of each and every part and parcel thereof, and that their title thereto is adjudged to be quieted against all claims, demands, or pretensions of the plaintiff, who is hereby perpetually estopped from setting up any claim or claims thereto or to any part thereof, and the title of the said defendants is subject only to such conveyances as may have been made since the commencement of this action by the defendants William B. Franklin, Thomas C. Blair, Albert Amsbury, and John J. Fayel.

*Sia*d mining claims are described as follows, to wit: That certain mining claim known as the Holy Terror Lode claim, recorded in the office of the register of deeds of said Pennington county, in Book "16" of Location Certificates, on page 128 thereof, and situated in Cross mining district, in said county, and being bounded on the east by the Keystone No. 1 Lode claim, and on the west by the Keystone No. 4 Lode claim, and on the south by the Reed placer claim, the same being a patented claim, being known as M. C. No. 903, and said Holy Terror Lode claim being about five hundred feet east of U. S. L. M. No. 29, and extending along the vein of said Holy Terror lode five hundred feet southeasterly from the center of the discovery shaft and notice, and one thousand feet northwesterly from said discovery shaft and notice, and one hundred and fifty feet on each side of the middle of the vein; also that certain mining claim situate in Cross mining district, in said Pennington county, and known as the Keystone No. 4 Lode mining claim, being and situate on the west side of Battle creek, in said county, and recorded in the office of the register of deeds of said Pennington county, in Book "17"
53 of Location Certificates, on page 639 thereof, and being bounded on the east by the Keystone No. 3 lode, with which it is parallel, and on the south by the Reed placer claim, a patented claim known as M. C. No. 903, and extending along the vein thirteen hundred and fifty feet northwesterly from the center of the discovery shaft and notice, and one hundred — fifty feet southeasterly from said discovery shaft and notice, and one hundred and fifty feet on each side of the middle of the vein.

It is further ordered, adjudged, and decreed that the plaintiff's complaint herein be, and the same is hereby, dismissed upon its merits, and that the defendants do have and recover of and from the plaintiff their costs and disbursements in this action in the sum of eighty and $\frac{85}{100}$ ($80.85) dollars, to be taxed by the clerk of this court and inserted herein, and that execution issue therefor.

Done at Rapid City, South Dakota, this 27th day of February, 1896, and the clerk of this court is directed to enter this judgment.

By the court:

WILLIAM GARDNER, *Judge.*

Which judgment was duly filed for record in the office of the clerk of said court on February 27, 1896, and recorded at length on that day in Book 7 of Judgments, page 314.

54 In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota within and for Pennington County.

PATRICK B. McCARTHY, Plaintiff,
vs.
EDWARD W. SPEED, as Administrator of the Estate of William Franklin, Deceased; Jennie E. Franklin and Cora C. Stone, as Heirs-at-law of said William Franklin, Deceased; Thomas C. Blair, Albert Amsbury, and John J. Fayel, Defendants.

Notice of Motion for a New Trial.

Please take notice that the plaintiff above named will move the court above named for a new trial of the above entitled action at the court-house, in the city of Rapid, South Dakota, on the 30th day of September, 1896, at ten o'clock a. m., or so soon thereafter as counsel can be heard, and that said motion will be based upon the following grounds:

(1.) The court erred in overruling the objection of the defendants to the following question asked of the witness James Jacoby: "Q. And what, if anything, does it contain in remunerative or paying quantities of precious metals?" And also to all the testimony offered to that question throughout the record which tended to show that the Tin Bar No. 1 location was an invalid location, either because no discovery of rock in place was made thereon or because of failure to do the assessment-work thereon, for the reason that the defendants were estopped by their acts and conduct from asserting in this action that there was no valid discovery on the Tin Bar No 1 lode or that the same was an invalid lode for any reason.

(2.) The court erred in making the 21st finding of fact so far as the court says, "But that the said plaintiff and the defendants had no knowledge of the existence of tin or other valuable deposits therein until after this action was commenced, to wit, until during the trial of this case," for the reason that the evidence to justify that portion of said finding is wholly insufficient in this:

55 It is shown by the undisputed evidence of William Challis that in 1891 there was tin on the side of the dyke sticking out, and that the character of the dyke upon which the discovery was made was tin rock, and that in 1891 the defendant William Franklin claimed that it was a good tin mine to said Challis, and that he wanted said Challis to sell it to the Harney Peak Tin Company as a tin mine.

The evidence of the defendant Thomas Blair shows that the defendants located the Tin Bar group of claims in order to make a sale of them through Frank Eaton and try to sell them as tin claims, and the names given to them shows they were located as tin claims.

The evidence of Thomas Tracy shows that long prior to the time of trial he had a conversation with William B. Franklin in which he stated that the mica dyke upon which the discovery of Tin Bar No. 1 was made was tin rock.

The evidence of Ernest Schleuning shows that he had two conversations with Blair and Franklin in which they said there was a showing of tin on the Tin Bar group, and that he thought he could dispose of the ground to the tin company; that it was showing up in tin. That was in 1890. All of this evidence is undisputed.

It is also undisputed that the defendants made these locations and filed location certificates, especially for Tin Bar No. 1, which location certificate recites that the defendants claimed the Tin Bar No. 1 by right of discovery and location; it is also undisputed that William B. Franklin, in the case of Micaeh McGuire *et al.*, plaintiffs, *vs.* William Franklin and Jennie E. Frankin, defendants, in an action in the circuit court of the seventh judicial circuit of the State of South Dakota within and for the county of Pennington, alleged that they did the annual assessment-work for the plaintiffs Patrick B. McCarthy on the Tin Bar No. 1 mining claim for the years 1889, 1890, and 1891; and in an action in which William Franklin was plaintiff — Patrick B. McCarthy was defendant, in the same court, Wil-
56 liam Franklin alleged that he did the work upon said Tin Bar No. 1 mining claim for the years 1889, 1890, and 1891 to the extent of $100.00.

It is further in evidence that the location certificate of the Tin Bar No. 1 was of record in Pennington county, and that at the time said Patrick B. McCarthy bought his interest in said Tin Bar No. 1 claim that he examined the records of the county in order to see whether or not it was properly recorded, and relied upon said record.

(3.) The court erred in making the first conclusion of law.
(4.) The court erred in making the second conclusion of law.
(5.) The court erred in making the third conclusion of law.
(6.) The court erred in making the fourth conclusion of law.
(7.) The decision of the court was against law.
(8.) The court erred in entering judgment in favor of the defendants and against the plaintiff.

This motion will be based upon the bill of exceptions which has already been settled in this case, and upon all the papers and proceedings in the above-entitled action.

CHARLES W. BROWN AND
McLAUGHLIN & McLAUGHLIN,
Attorneys for the Plaintiff.

To James W. Fowler and Temple & Gardner, attorneys for defendants.

57 In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota in and for the County of Pennington.

PATRICK B. McCARTHY, Plaintiff,
vs.
EDWARD W. SPEED, as Administrator of the Estate of William B. Franklin, Deceased; Jennie E. Franklin and Cora C. Stone, as Heirs-at-law of said William B. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, and John J. Fayel, Defendants.

Order Overruling Motion for a New Trial.

Now, on this day, pursuant to notice duly served, coming on regularly to be heard the motion of the plaintiff for a new trial of this action, Charles W. Brown, Esq., and Messrs. McLaughlin & McLaughlin appearing in support of said motion, and James W. Fowler, Esq., and W. O. Temple, Esq., appearing in opposition thereto, and the court having heard the arguments of counsel and being fully advised in the premises—

It is considered and ordered that the said motion be, and the same hereby is, overruled and denied.

Done in said county this 30th day of September, 1896.

By the court:

WILLIAM GARDNER, *Judge.*

To which order and ruling the plaintiff at the time duly excepted, and at his request this exception is signed and allowed.

WILLIAM GARDNER, *Judge.*

58 In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota within and for Pennington County.

PATRICK B. McCARTHY, Plaintiff,
vs.
EDWARD W. SPEED, as Administrator of the Estate of William Franklin, Deceased; Jennie E. Franklin and Cora C. Stone, as Heirs-at-law of said William Franklin, Deceased; Thomas C. Blair, Albert Amsbury, and John J. Fayel, Defendants.

Notice of Appeal.

Take notice that the plaintiff, Patrick B. McCarthy, hereby appeals to the supreme court of the State of South Dakota from the judgment of said circuit — rendered and entered herein on the 27th day of February, 1896, in favor of the defendants and against the plaintiff, ordering, adjudging, and decreeing the dismissal of the plaintiff's complaint herein upon its merits and the recovery from the plaintiff by the defendants of the sum of $80.85 for their costs and disbursements of this action and other relief in said judgment specified, and from the order of said circuit court made and entered herein on the 30th day of September, 1896, overruling and denying

the motion of the plaintiff for a new trial of this action and from the whole and every part of said judgment.

And, further, take notice that upon the said appeal the said plaintiff and appellant will insist upon a review and reversal by said supreme court of the whole and every part of the said judgment and order and of the decision upon which the said judgment was rendered and entered.

Dated at Rapid City, South Dakota, this 3rd day of October, A. D. 1896.

CHARLES W. BROWN AND
McLAUGHLIN & McLAUGHLIN,
Attorneys for Plaintiff and Appellant.

To James W. Fowler, Esq., and Messrs. Temple & Gardner, attorneys for said defendants, and to Frank P. Cory, clerk of said circuit court.

59 In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota in and for Pennington County.

PATRICK B. McCARTHY, Plaintiff and Appellants, *versus* EDWARD W. SPEED, as Administrator of the Estate of William B. Franklin, Deceased; Jennie E. Franklin and Cora C. Stone, as Heirs-at-law of said William B. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, and John J. Fayel, Defendants and Respondents.	Undertaking on Appeal.

Whereas, on the 27th day of February, 1896, in the said circuit court within and for the said county of Pennington, the above-named defendants and respondents recovered a judgment against the above-named plaintiff and appellant ordering, adjudging, and decreeing the dismissal of the plaintiff's complaint herein upon its merits and the recovery from the plaintiff by the defendants of the sum of $80.85 for their costs and disbursements of this action and other relief in said judgment specified; and whereas the said circuit court, on the 30th day of September, 1896, made and entered an order overruling and denying the motion of the plaintiff for a new trial of said action; and

Whereas the above-named plaintiff and appellant, feeling aggrieved thereby, intends to appeal from the whole and every part of said judgment and order to the supreme court of the State of South Dakota:

Now, therefore, we do hereby undertake, promise, and agree that the said plaintiff and appellant will pay all costs and damages which may be awarded against him on the said appeal or on a dismissal thereof not exceeding the sum of two hundred and fifty dollars.

Dated at Rapid City, South Dakota, this 3rd day of October, 1896.

PATRICK B. McCARTHY. [SEAL.]
ZACHARIAH HOLMES. [SEAL.]
ABRAM C. BOLAND. [SEAL.]

60 STATE OF SOUTH DAKOTA, } ss:
County of Pennington, }

On this 3rd day of October, A. D. 1896, before me, Charles W. Brown, a notary public within and for said county and State, personally appeared Zachariah Holmes, Patrick B. McCarthy, and Abram C. Boland, known to me to be the persons who are described in and who executed the foregoing and within undertaking, and severally duly acknowledged to me that they executed the same.

[SEAL.] CHARLES W. BROWN,
Notary Public.

STATE OF SOUTH DAKOTA, } ss:
County of Pennington, }

Zachariah Holmes and Abram C. Boland, being severally duly sworn, each for himself and not one for the other, upon his oath says: The said Zachariah Holmes, for himself, says that he is a resident and freeholder within said State; that he is worth the sum of five hundred dollars over and above all his debts and liabilities in property within this State not by law exempt from execution; and the said Abram C. Boland, for himself, says that he is a resident and freeholder within said State, and that he is worth the sum of five hundred dollars over and above all his debts and liabilities in property within this State not by law exempt from execution; and the said affiants further say that they are the sureties named in and who executed the foregoing undertaking, and that the said Zachariah Holmes resides in the city of Rapid City, in said State, and that the said Abram C. Boland resides near the said city of Rapid City, in said county of Pennington, to wit, about one-half mile from said city of Rapid City.

ZACHARIAH HOLMES.
ABRAM C. BOLAND.

Subscribed and sworn to before me this 3rd day of October, A. D. 1896.

[NOTARIAL SEAL.] CHARLES W. BROWN,
Notary Public.

61 "H"-r-975.

In the Supreme Court, State of South Dakota.

PATRICK B. McCARTHY, Appellant,
vs.
EDWARD W. SPEED, as Administrator of the Estate of William B. Franklin, Deceased; Jennie E. Franklin and Cora C. Stone, as Heirs-at-law of said William B. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, and John J. Fayel, Respondents.

Opinion. Filed December 21, 1898.

Appeal from circuit court, Pennington county.

Charles W. Brown and McLaughlin & McLaughlin, for appellant.

James W. Fowler, Loomis S. Cull, and Fred H. Whitfield, for respondents, except Fayel.

W. O. Temple and A. K. Gardner, for respondent John J. Fayel.

HANEY, *J.*:

This action, brought for the purpose of determining adverse claims to certain mining property, was tried by the court and resulted in a judgment wherein the claims of plaintiff are adjudged invalid. He appeals from such judgment and from an order denying a new trial.

From the findings of the trial court the following facts appear: On September 16, 1882, Jacob F. Reed and William Franklin located a portion of the ground in controversy as the Reed
62 placer mining claim. From the date of location until 1892 Reed and Franklin were in actual, notorious, and peaceable possession of the claim, were acknowledged and reputed to be the owners, and during each year performed the required development work. They applied for patent November 23, 1892. Final entry was made March 13, 1893. There was no application for a lode on the placer site aside from the placer claim. The boundaries of the claim as patented coincide with its boundaries as staked upon the ground at the time of location. January 25, 1888, Reed, Franklin, Thomas C. Blair, and Frank Eaton marked the boundaries of Tin Bar No. 1 claim upon the ground with stakes, as required by law, posted a discovery or location notice thereon, and within sixty days thereafter recorded a location certificate, but did no other act of location at that time. The location or discovery notice of this claim was posted inside the boundaries of the Reed placer claim, and the point claimed as discovery on the Tin Bar No. 1 is the same point at which the notice was posted. No labor has been performed or improvements made upon the claim, except about 4 days' work in 1889 and about 4 days' work in 1891, such work not exceeding $14 in each of those years. There was no agreement on the part of defendants Blair and Franklin with plaintiff to perform labor or make

improvements on Tin Bar No. 1 in 1893 or 1894, and no contractual relation existed between them in regard to such claim when the Holy Terror claim was located. January 25, 1888, Blair and Eaton did the same acts of location with respect to Tin Bar No. 2 that were done in respect to Tin Bar No. 1. No labor has been performed or improvement made upon Tin Bar No. 2, except about 4 days' work in 1891, of value not exceeding $14. There was no agreement on the part of the defendants Franklin or Blair with plaintiff to perform labor or make improvements upon Tin Bar No. 2 in 1892, 1893, or 1894, and there was no contractual relation existing between them in regard to such claim during those years. Defendant Franklin located the lode claims Holy Terror and Keystone No. 4 on June 28, 1894, and September 20, 1894, respect-
63 ively, and the law has been complied with so far as it relates to those claims since the date of each. Defendants are the owners of the Holy Terror and Keystone No. 4, save for the rights of the plaintiff in this action. No adverse was filed by plaintiff or other owners of either Tin Bar No. 1 or 2 to the application for patent to the Reed placer claim. At and prior to the time of the application for patent to the placer claim there was no known lode or vein therein within the boundaries of either Tin Bar claim of such character as to render the ground more valuable because of its presence or to justify the expenditure of money for either exploitation or development. There was no application for patent to any lode or vein included in the placer claim in the application for patent to the placer claim. The Holy Terror embraces 1.62 acres of the ground covered by the Tin Bar No. 1 and Keystone No. 4 embraces 2.71 acres of the ground covered by Tin Bar No. 2. In 1888 Eaton conveyed an undivided one-fourth interest in Tin Bar No. 1 and Tin Bar No. 2 to George Williams, who in the same year conveyed the same interest to plaintiff and one Michael McGuire. On April 22, 1890, Eaton conveyed an undivided one-fourth interest in Tin Bar No. 2 to defendant Franklin, and Blair conveyed a like interest therein to Jacob F. Reed. When this action was commenced Franklin, since deceased, and defendants Blair, Fayel, and Amsbury each owned an undivided one-fourth interest in the Holy Terror claim and an undivided seven-thirty-sixths interest in Keystone No. 4. Blair acquired his interest in the Holy Terror Lode claim with full knowledge of whatever rights the plaintiff had, if any. During 1891 Blair and Franklin discovered a well-defined ledge of mineral-bearing rock in place, carrying gold, upon Tin Bar No. 2, the point of discovery being outside the limits of Reed placer claim. The location notice on Tin Bar No. 1 was posted upon a well-defined ledge of rock carrying tin, but plaintiff and defendants had no knowledge of the existence of tin or other valuable deposit therein until the
64 trial of this action in the court below. There is no proof that the plaintiff is, ever was, or ever declared his intention of becoming a citizen of the United States.

It will be assumed that the evidence sustains the findings of fact. Do they support the judgment? Defendants cannot question plain-

tiff's citizenship in this action. Manuel *v.* Wulff, 152 U. S., 505; 14 Sup. Ct. Rep., 651.

It is the theory of plaintiff that he owned an interest in each of the Tin Bar claims upon which the annual assessment-work was not done; that a portion of the ground covered by each was relocated by his cotenant as the Holy Terror and Keystone No. 4; that such relocations were valid, but that the relocators should be adjudged to be his trustees to the extent of his interest in the Tin Bar claims. This theory necessarily involves the validity of the Tin Bar locations. It is contended by defendants that neither claim ever existed for the reason that there was no actual discovery within its limits; that the Tin Bar No. 1 discovery notice was posted within the boundaries of the then subsisting unpatented placer claim, and that if the Tin Bar location was originally valid, the claim ceased to exist when the placer claim was patented.

It seems to be well settled that a stranger cannot locate a lode claim within the limits of another subsisting unpatented lode claim, but our attention has not been called to any decision which applies this rule to unpatented placer claims. In Mr. Lindley's recent work this language is found: "The policy of the gover-ment with reference to lodes is to sever them from the body of the public lands and to deal with them and the land immediately inclosing them as separate and distinct entities. The location of mining ground for placer purposes does not effect such severance. The placer claimant may, in the absence of a discovery and location by others, obtain the title to the lode, but he has not such right by virtue of his prior placer appropriation. This right to appropriate the lode must flow from the discovery of the lode. Whosoever first discovers the lode may appropriate it by complying with the
65 laws confer-ing privileges upon such discoveries. If he fails to do so, it is open to the next comer, and this rule applies to the placer claimant as well as to strangers. If, having discovered it, he fails to manifest his intention to claim it by appropriating it under the lode laws, it may be the subject of appropriation by others the same as if it were upon the public domain, provided always that such appropriation is made and perfected peaceably and in good faith." 1 Lindley on Mines, sec. 413. However this may be with respect to strangers, there is certainly no reason for holding that the owner of an unpatented placer claim cannot locate a lode claim or consent to such a location being made by others within the boundaries of his placer claim. Under such circumstances it would hardly be logical to regard the placer owner as a trespasser upon his own premises, and, as we shall attempt to show hereafter, the defendants are estopped from questioning the validity of the Tin Bar claims to the injury of the plaintiff. We think the learned circuit court erred in concluding that the Tin Bar No. 1 claim was invalid in its inception because its point of discovery was within the boundaries of the placer claim.

If the Tin Bar claims were located when application for patent to the placer was made, they were not affected thereby, no application for lodes having been included in the application for the placer

patent. Noyes *vs.* Mantle, 127 U. S., 348; Iron S. M. Co. *vs.* Mike & Starr G. & S. M. Co., 12 Sup. Ct. Rep., 543.

As to what constitutes a discovery within the meaning of the Federal statutes has caused the courts no little trouble. It might be difficult to determine in this case from the findings of the trial court whether any discovery was ever made upon either Tin Bar claim, but are these defendants in position to allege or prove as against the plaintiff that the declarations contained in the recorded location certificates were false, and that no discoveries were in fact ever made? We think not. Can the locators of these claims
66 be heard to contradict their own recorded representations to the injury of this plaintiff?

It is disclosed by the evidence that plaintiff purchased his interest in the Tin Bar claims for a valuable consideration after an examination of the records, relying upon the location certificates which were placed upon the public records by the locators for the purpose of selling the property as mining claims. Where one of his conduct intentionally causes another to believe in the existence of a certain state of facts and induces him to act on that belief, the former is estopped from averring against the latter the existence of a different state of facts at the same time. The locators of these claims, with actual knowledge of the facts, caused location certificates to be recorded, thereby representing that discoveries had been made on each, with the expectation and intention of inducing persons who might examine the records to believe that they were the owners of properly located mining claims. This conduct produced intended results. They sold an interest in the claims, plaintiff examined the records, was induced to believe that the claims had been legally located, and acted on such belief. Whatever rights he has in this action depend upon the facts which the conduct of the locators induced him to believe existed when his interest in the claims was acquired. It would be a travesty on justice to permit the locators to now impair such rights by asserting that their recorded representations were false. Neither of the defendants is in any better position that the original locators, and all are estopped from denying the validity of the Tin Bar locations.

It being determined that for the purpose of this action the Tin Bar claims were valid in their inception, the main controversy is whether, when the annual assessment-work has not been done upon a mining claim, one cotenant therein can relocate the same and obtain title thereto, not only as against the world, but as against his cotenants. We are not aware that the precise question
67 here presented has ever been decided by any court of last resort. It is well settled that cotenants stand in a certain relation to each other of mutual trust and confidence; that neither will be permitted to act in hostility to the other in reference to the joint estate, and that a distinct title acquired by one will inure to the benefit of all. This principle arises from the privity subsisting betwe-n parties having a common possession of the same land and a common interest in the safety of the possession of each, and it only inculcates that good faith which seems appropriate to their

relative position. Venable *vs.* Beauchamp, 3 Dana, 321. It has been applied to mining property by the Federal Supreme Court. In a case in that court where one had acquired an interest in an unpatented claim, by purchase at sheriff's sale, and obtained a patent to the entire property to the exclusion of another, who was found to own an interest therein, it was decided that the patentee held the title in trust for his cotenant, and that a court — equity would inforce the trust, and that the excluded cotenant was not required to adverse the application for patent. Turner *vs.* Sawyer, 150 U. S., 578; 14 Sup. Ct. Rep., 192. Therefore the only question to be determined in this connection is whether the relation of cotenant existed between plaintiff and Franklin when the latter located the Holy Terror and Keystone claims. "A mining claim perfected under the law is property in the highest sense of that term which may be bought, sold, and conveyed and will pass by descent." Belk *vs.* Meagher, 104 U. S., 279. Actual possession of the claim is not essential to the validity of the title obtained by a valid location, and until such location is terminated by abandonment or forfeiture no right or claim to the property can be acquired by an adverse entry thereon with a view to the location thereof. Belk *vs.* Meagher, *supra*. Abandonment is always a question of intention. In forfeiture the element of intention is not involved. It rests entirely upon the statute and involves only the question whether
68 the terms of the law have been complied with. Lapse of time, absence from the ground, or failure to work a claim for any definite period unaccompanied by other circumstances are not evidence of abandonment. Original locators may resume work at any time before relocation. Forfeiture is not complete until some one else has appropriated the property. 2 Lindley on Mines, 644; U. S. Rev. Sts., 2324. Plaintiff and Franklin continued to be cotenants so long as the Tin Bar claims continued to exist; they continued to exist until the ground was relocated and during every instance of that time the latter was in law incapable of performing any act in hostility to his cotenant in reference to the joint estate. Franklin was plaintiff's cotenant at the time he entered the boundaries of either Tin Bar claim for the purpose of relocating the ground. His entry for that purpose was host-le to his cotenant unless he intended to relocate for the benefit of all the owners of the Tin Bar claims. It may be that he owed no duty to his cotenants to represent the claims; it may be that he was at liberty to refrain from performing any act in reference thereto; but if he elected to act at all he was bound to act for the benefit of all the owners. His acts of relocation did not terminate the fiduciary relation between himself and plaintiff, because they were, if done for the purpose of defeating the rights of his cotenants, in hostility to his interests, and if they were not done for that purpose they, of course, operated to the benefit of all the owners. We think the circuit court should have adjudged the defendants to be trustees and have enforced the trusts. This conclusion is not precluded by the language of the Federal statutes. They provide that, upon a failure to comply with required conditions as to labor or improvements,

"the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made." U. S. Rev. Sts., 2324. It is contended that if Congress intended to have the relocator regarded as a trustee under any circumstances such intention would have been expressed in the statute. The contention is not tenable. The trust
69 results from the fiduciary relation of the parties and not from the operation of the statute. If such relations exists between an original locator and another and he secures a patent no one will deny that he may be adjudged to hold the property in trust for such person, or if a relocator sustains such relation to a third person the latter rights may be enforced in equity. If this be true there is no reason for making a different rule as to cotenants. The relocator is permitted by the statute to acquire the property in the same manner that the original locator would have acquired it, but because of his relation to another, who may be a cotenant, a mortgagee, or person having no estate in the property, he will be adjudged to hold the title in trust for such person. In all cases of this character the trust depends upon the relation of the parties, not upon the manner in which title is acquired.

It is contended that the rule herein announced is contrary to public policy and will result in endless embarassment and confusion to a claim of rights already sufficiently uncertain. We reply that a sound public policy always requires honesty and fair dealing. The Federal statutes provide a most arbitrary and summary manner, commonly called "advertising out," in which one owner of a mining claim may compel his co-owners to contribute their share of assessment-work or cease to have any interest in the claim. An adequate method is thus provided for enforcing the rights of co-owners in respect to the development of mining property, one that should satisfy the demands of all persons who desire to act fairly with their business associates.

It is urged in argument of counsel for appellant that the judgment below should be reversed and cause remanded with directions to enter judgment for plaintiff. This we think should not be done. All the facts upon which we predicate an estoppel are not contained in the finding of fact; this court cannot supply such facts, and without them the decision of the trial court would not sustain a judgment in favor of the plaintiff. The judgment and order de-
70 nying a new trial are reversed and a new trial ordered.

STATE OF SOUTH DAKOTA, *ss*:

In Supreme Court.

PATRICK B. McCARTHY, Plaintiff and Appellant,
vs.
EDWARD W. SPEED, Defendant and Respondent.

I, Jessie Fuller, clerk of the supreme court in and for the State of South Dakota, do hereby certify that the foregoing pages numbered from one to eleven, inclusive, contain a true and correct copy of the

opinion filed December 21, 1898, in the above-entitled cause and of the whole thereof, as the same now remains of record in said supreme court.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Pierre, this 5th day of October, A. D. 1899.

JESSIE FULLER,
[SEAL.] *Clerk of the Supreme Court.*

71 "H"-r-975.

In the Supreme Court, State of South Dakota.

PATRICK B. MCCARTHY, Appellant,
vs.
EDWARD W. SPEED, as Administrator of the Estate of William B. Franklin, Deceased; Jennie E. Franklin and Cora C. Stone, as Heirs-at-law of said William B. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, and John J. Fayel, Respondents.

Opinion. Filed September 2, 1899.

Appeal from Pennington county circuit court.

Charles W. Brown and McLaughlin & McLaughlin, for appellant.

Schrader & Lewis and Fowler, Cull & Whitfield, for respondents.

HANEY, *J.:*

The issue involved in this action are stated in our former decision, S. D., 77 N. W., 590. Upon the argument on rehearing respondents moved to dismiss for the following reasons: 1. Because the order denying an order for a new trial was not entered *with* the appeal was taken; and 2, because since the appeal was taken all the ground in controversy has been conveyed by defendants to a corporation to which a patent has issued by the United States Government. It has been frequently held by this court that where the appeal is from the judgment, and an order made after judgment, and the order has never been entered, the case will be considered as an appeal from the judgment alone. McCormack Harv. Mach. Co. *vs.* Woulph, S. D., 76 N. W., 939. The motion to dismiss for the reason must be denied and the record reviewed as if no mo-
72 tion had been made. It must also be denied on the second ground. It is alleged that a notice of the pendency of the action was filed in the proper county; if so, the defendants' transferee acquired title with constructive notice of the plaintiff's interest in the property. Comp. Laws, 4897. Plaintiff is not seeking to prevent the defendants or their grantee from acquiring title under locations conceded to be valid, but it is seeking to establish his rights to an interest in the property by virtue of the location under which defendants claim title. If defendant's successor has obtained a patent with notice of plaintiff's rights, a court of equity can decree that plaintiff, as cotenant of the original locators, has an interest in

the property, and that the patentee holds the title in trust for the excluded cotenant. Plaintiff was not required to adverse the application for patent. Turner *v.* Sawyer, 150 U. S., 578; 14 Supt. Ct., 192; Suessenbach *v.* Bank, 5 Dak., 477; 41 N. W., 662.

Since the rehearing the questions presented by the merits of the appeal have received careful attention. The views announced by our former opinion are adhered to with slight modifications rendered necessary by the fact, since disclosed, that the order granting a new trial was not entered, and that the evidence is not properly before us. It is stated in our former decision "that the evidence disclosed that the plaintiff purchased his interest in the Tin Bar claims for a valuable consideration after an examination of the records, relying upon the location certificates which were placed upon the public records by the locators for the purpose of selling the property as mining claims." And this: "It is urged in argument of counsel for appellant that the judgment below should be reversed and the cause remanded with directions to enter judgment for plaintiff." This we think should not be done. All the facts — which we predicate an estoppel are not contained in the findings of
73 fact. This court cannot supply such facts, and without them the decision of the trial court would not sustain a judgment in favor of the plaintiff. The judgment and order denying a new trial are reversed, and new trial ordered." It now appears we cannot consider the evidence and must base our decision upon the facts found by the court below. Its findings show that Reed, Franklin, Blair, and Eaton recorded a location certificate for Tin Bar No. 1, and that Blair and Eaton recorded a location certificate for Tin Bar No. 2 in the office of the register of deeds in the proper county before plaintiff purchased his interest in said claims; that neither defendant is in any better position than the original locators. And whether or not the plaintiff examined and relied upon the records, we think defendants are estopped from denying the validity of these locations. It follows that plaintiff is entitled to a judgment in his favor upon the facts as found by the trial court. Its judgment is therefore reversed and the cause remanded with directions to enter judgment, and adjudging the plaintiff to be the owner of a one-eighth interest in and to so much of the ground covered by the Holy Terror claim and the Keystone No. 4 claim as is embraced within the boundaries of the Tin Bar No. 1 and Tin Bar No. 2, as shown by the circuit court's findings of fact, and for his costs and disbursements in the court below.

STATE OF SOUTH DAKOTA, *ss:*

In Supreme Court.

PATRICK B. McCARTHY, Plaintiff and Appellant,
vs.
EDWARD W. SPEED ET AL., Defendants and Respondents.

I, Jessie Fuller, clerk of the supreme court in and for the State of South Dakota, do hereby certify that the foregoing pages numbered

from 1 to 4, inclusive, contain a true and correct copy of the opinion filed Sept. 2, '99, in the above-entitled cause, and of the whole thereof, as the same now remains of record in said supreme court.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Pierre, this 5th day of October, A. D. 1899.

JESSIE FULLER,
Clerk of the Supreme Court.

[SEAL.]

74 In the Supreme Court, State of South Dakota.

Be it remembered that at a term of the supreme court of the State of South Dakota, begun and held at Pierre, State of South Dakota, on the first Tuesday of April, A. D. 1899, on the 54th day of the term, to wit, on the 2nd day of September, A. D. 1899—present, Dighton Corson, presiding judge, and Howard G. Fuller and Dick Haney, judges of said court—the following proceedings were had and the following judgment was entered, to wit:

File No., 975.

In the Supreme Court, State of South Dakota, April Term, A. D. 1899.

Present: Dighton Corson, presiding judge; Howard G. Fuller and Dick Haney, judges of said court, and the officers thereof.

PATRICK B. MCCARTHY, Plaintiff and Appellant,
vs.
EDWARD W. SPEED, as Administrator; JENNIE E. FRANKLIN *et al*, Defendants and Respondents.

This action coming on to be heard at the April, A. D. 1899, term of this court, at the supreme court room, in the city of Pierre, State of South Dakota, upon the merits of the appeal and respondents' motion to dismiss, the same being argued orally by C. L. Lewis and James W. Fowler for respondents, and Charles W. Brown and W. L. McLaughlin for appellants, and the court having advised thereon and filed its decision in writing—

It is considered, ordered, and adjudged that the judgment of the circuit court within and for Pennington county appealed from herein be, and the same is hereby, reversed; that respondents'
75 motion be denied and the cause remanded with directions to enter judgment as directed in the aforesaid decision.

And it is further ordered that this action be, and it is hereby, remanded to said circuit court for further proceedings according to law and the decision of this court.

And it is further ordered and adjudged that appellant have and recover of the respondents costs and disbursements on this appeal expended, taxed, and allowed at three hundred sixty and $\frac{15}{100}$ dollars.

By the court:

D. CORSON,
Presiding Judge.

Attest: JESSIE FULLER, *Clerk.*

[SEAL.]

STATE OF SOUTH DAKOTA, } ss:
County of Hughes, }

I, Jessie Fuller, clerk of the supreme court within and for the State of South Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of judgment and order of the supreme court of the State of South Dakota in the above-entitled action, wherein Patrick B. McCarthy is plaintiff and appellant *versus* Edward W. Speed *et al.*, defendants and respondents, as the same now remains of record in said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 5th day of October, A. D. 1899.

[SEAL.] JESSIE FULLER, *Clerk.*

76 Costs and disbursements taxed and allowed as follows:

Costs.

Before argument	$5.00
Before argument on rehearing	5.00
For argument	15.00
For argument on rehearing	15.00
Making and serving case necessarily containing more than 50 folios	7.00

Disbursements.

Clerk's fees to perfect appeal record	2.00
Stenographer's fees to perfect appeal record	76.80
Printing brief, 31 pages	31.00
Printing brief on rehearing	12.75
Printing abstract, 123 pages, at $1.00, and map, $20.00	143.00
Printing supplemental brief, 10 pages	10.00
Fees clerk supreme court	31.05
Fees clerk supreme court on rehearing	5.05
Expressage and postage	1.50
Total	$360.15

(Endorsed upon the back as follows:)

(File No., 975.) In supreme court, State of South Dakota, April term, 1899. Patrick B. McCarthy, plaintiff and app'l't, *vs.* Edward W. Speed, as administrator, *et al.*, defendants and resp'd'ts. Filed in open court this 2d day of September, 1899. Jessie Fuller, clerk. Remittitur. Filed Oct. 9, 1899. John P. McElroy, Jr., clerk of courts. Book 9, page 104 & 105.

77 "EXHIBIT A."

In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota within and for the County of Pennington.

PATRICK B. McCARTHY, Plaintiff,
vs.
EDWARD W. SPEED, as Administrator of the Estate of William B. Franklin, Deceased; Cora C. Stone, as Heir-at-law of said William B. Franklin, Deceased; Georgia B. Bierman, as Sole Devisee and Heir-at-law of Jennie E. Franklin, Deceased; Alvah F. Fay, as Executor of the Last Will of said Jennie E. Franklin, Deceased; Thomas C. Blair, Albert Amsbury; John S. George, George E. Yost, and Philip M. Ranney, as Executors of the Last Will and Testament of John J. Fayel, Deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, Her Guardian, as Heirs-at-law and Successors in Interest of said John J. Fayel, Deceased, Defendants. } Judgment.

This action having come on for trial before the court on the 17th day of January, 1896, and the court having thereafter, on February 15, 1896, filed its decision in writing herein, and having thereafter, on February 27, 1896, entered judgment in said action in favor of the defendants and against the plaintiff upon all the issues, and the plaintiff having thereafter, within the time allowed by law, to wit, on the 6th day of October, 1896, duly appealed to the supreme court of the State of South Dakota from the said judgment and from the order heretofore made herein overruling the plaintiff's motion for a new trial of this action, and the supreme court of the State of South Dakota having thereafter, on September 2, 1899, duly entered a judgment on said appeal reversing the said judgment of the circuit court and remanding the cause to the court below, with directions to the circuit court to enter judgment in favor of the plaintiff and against the defendants for a part of the relief prayed by the plaintiff, together with the costs and disbursements of
78 this action, and the defendant Jennie E. Franklin having departed this life on or about the first day of December, A. D. 1898, and the said Georgia B. Bierman, as sole devisee and heir-at-law of said Jennie E. Franklin, deceased, and the said Alvah F. Fay, as sole executor of the last will of said deceased, having been duly substituted as defendants herein in the place and stead of the said Jennie E. Franklin, deceased; and it having been suggested to the court that on the 21st day of October, 1898, the said defendant, John J. Fayel, departed this life, and that his representatives and successors in interest are John S. George, George E. Yost, and Philip M. Ranney, the duly appointed, qualified, and acting executors of the last will and testament of said John J.

Fayel, deceased, and Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, her guardian, sole heirs-at-law of said John J. Fayel, deceased; and the said representatives and successors in interest of said John J. Fayel, deceased, having heretofore been duly substituted as defendants herein in his place and stead, and the plaintiff having duly served a notice of motion in this court to enter judgment herein in favor of the plaintiff and against the defendants above named and each of them, in accordance with the mandate of the supreme court, Mr. Charles W. Brown appearing in support of said motion and Mr. James W. Fowler appearing for said defendants in opposition thereto, and the court being fully advised in the premises:

Now, therefore, on motion of Charles W. Brown and McLaughlin & McLaughlin, plaintiff's attorneys, it is considered, ordered, adjudged, and decreed that the plaintiff, Patrick B. McCarthy, is now and has been since the 28th day of June, 1894, the owner and entitled to the possession, as against the said defendants and each and all of them, of an undivided one-eighth ($\frac{1}{8}$) interest in and to the following-described portion of that certain mine and tract of land situate in Cross mining district, in said county of Pennington and State of South Dakota, and known as the Holy Terror Lode
79 claim, the location certificate of which was recorded on the 19th day of July, 1894, in the office of the register of deeds of said county, in Book 21 of Location Certificates, at page 22, to wit: Commencing at the southeast corner of said Holy Terror Lode claim, which corner is situate on the northerly line of the Reed placer claim, hereinafter mentioned, and running thence north 62° 12′ west 394.6 feet; thence south 28° west seven feet; thence south 41° 5′ west 102.1 feet; thence south 47° 57′ east 480 feet to the southwest corner of said Holy Terror Lode claim; thence north 15° 30′ east 22.7 feet to the place of beginning, containing an area of one and $\frac{62}{100}$ (1.62) acres, said Holy Terror Lode claim being bounded on the west by the Keystone No. 4 Lode claim and on the south by said Reed placer claim, a patented claim known as M. C. No. 903.

It is further considered, ordered, adjudged, and decreed that the plaintiff, Patrick B. McCarthy, is now and has been since the 13th day of March, 1892, the owner and entitled to the possession, as against the said defendants and each and all of them, of an undivided one-eighth ($\frac{1}{8}$) interest in and to the following-described portion of that certain mine and tract of land, situate in Cross mining district, in said county of Pennington and State of South Dakota, and known as the Keystone No. 4 Lode claim, the location certificate of which was recorded on the 5th day of May, 1892, in the office of the register of deeds of said county, in Book 17 of Location Certificates, on page 639, to wit: Commencing at the southeast corner of said Keystone No. 4 Lode claim, which corner is situate on the northerly line of said Reed placer claim, and running thence north 47° 57′ west 480 feet; thence south 38° 6′ west 119 feet; thence south 39° 36′ west 92 feet; thence south 41° 50′ east 135.1 feet; thence south 47° 57′ east 446.3 feet to the southwest corner of said Keystone No. 4 Lode claim; thence north 15° 30′ east 252.6 feet to the place of

beginning, containing an area of two and $\frac{71}{100}$ (2.71) acres, said Keystone No. 4 Lode claim being bounded on the east by
80 the Holy Terror Lode claim and on the south by said Reed placer claim.

It is further considered, adjudged, and decreed that the said defendants or either of them have no estate, right, title, or interest whatsoever in or to the said undivided one-eighth interest and estate of and in the above-described premises, and that the said title of the plaintiff is as against said defendants and each and all of them good and valid.

It is further considered, ordered, and decreed that the said defendants and each and all of them, their agents, servants, employees, and attorneys, be, and they hereby are, forever enjoined and debarred from asserting any estate, right, title, claim, or interest whatsoever in or to the plaintiff's said undivided one-eighth interest and estate in said above described premises adverse to the plaintiff.

And it is further considered and adjudged that the plaintiff, Patrick B. McCarthy, recover of the said defendants his costs and disbursements incurred upon the trial of this action in the circuit court, heretofore taxed and adjusted by the clerk of this court at the sum of $98.20, and his costs and disbursements incurred upon said appeal, heretofore taxed and allowed by the clerk of the supreme court at the sum of 360.15, amounting in the aggregate to four hundred fifty-eight dollars and thirty-five cents.

Done in open court, at Rapid City, in said circuit, this 13th day of January, A. D. 1900.

By the court:

LEVI McGEE, *Judge*.

Attest:

[SEAL.] JOHN P. McELROY, JR., *Clerk*.

In circuit court within and for Pennington county. Patrick B. McCarthy, plaintiff, *vs.* Edward W. Speed *et al.*, defendants. Judgment. Filed Jan. 13th, 1900. John P. McElroy, Jr., clerk of court. Charles W. Brown, McLaughlin & McLaughlin, attorneys for plaintiff. Book 9, pages 162 to 165.

[Endorsed:] Patrick B. McCarthy *vs.* Edward W. Speed, as administrator, etc. Judgment after appeal.

Endorsed on cover: File No., 17,689. South Dakota, Pennington county, circuit court. Term No., 230. Edward W. Speed, as administrator of William B. Franklin, deceased, *et al.*, plaintiffs in error, *vs* Patrick B. McCarthy. Filed March 26th, 1900.

No. 230.

FILED
MAR 14 1901
JAMES H. McKENNEY,
Clerk.

BRIEF FOR PLAINTIFFS IN ERROR.

Brf. of Quarles & Lines for P.E.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900.

No. 230.

Filed Mar. 14, 1901.

EDWARD W. SPEED, AS ADMINISTRATOR OF WILLIAM B. FRANKLIN, DECEASED, ET AL.,
Plaintiffs in Error,

vs.

PATRICK B. McCARTY,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF PENNINGTON COUNTY, STATE OF SOUTH DAKOTA.

(17,689.)

JAMES W. FOWLER,
FRED H. WHITFIELD,
CHARLES QUARLES,
Of Counsel.

JOSEPH V. QUARLES,
GEORGE LINES,
Counsel for Plaintiffs in Error.

THE EDW. KEOGH PRESS, BROADWAY, MILWAUKEE.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 230.

EDWARD W. SPEED, AS ADMINISTRATOR OF THE ESTATE OF WILLIAM B. FRANKLIN, DECEASED; CORA C. STONE, AS HEIR-AT-LAW OF SAID WILLIAM B. FRANKLIN, DECEASED; GEORGIA B. BIERMAN, AS SOLE DEVISEE AND HEIR-AT-LAW OF JENNIE E. FRANKLIN, DECEASED; ALVAH F. FAY, AS EXECUTOR OF THE LAST WILL OF SAID JENNIE E. FRANKLIN, DECEASED; THOMAS C. BLAIR, ALBERT AMSBURY, JOHN S. GEORGE, GEORGE E. YOST AND PHILLIP M. RANNEY, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF JOHN J. FAYEL, DECEASED; ALMA LAMBERT FAYEL AND THERESA HELEN FAYEL, BY ALMA LAMBERT FAYEL, HER GUARDIAN, AS HEIRS-AT-LAW AND SUCCESSORS IN INTEREST OF JOHN J. FAYEL, DECEASED.

Plaintiffs in Error.

vs.

PATRICK B. McCARTHY.

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

This is a writ of error to a judgment of the circuit court of Pennington County, State of South Dakota, rendered and entered by that court on the 13th day of January, A. D. 1900, in obedience to the opinion and mandate of the supreme court of the State of South Dakota, commanding said judgment to be entered.

STATEMENT OF THE CASE.

The action was commenced on the 12th day of April, 1895, in the circuit court of Pennington County, South Dakota, by the defendant in error against Thomas C. Blair, Albert Amsbury, William B. Franklin and John J. Fayel. Franklin and Fayel, and also Jennie E. Franklin, one of the heirs at law of William B. Franklin, having died *pendente lite*, the action was duly revived against their several personal representatives and heirs at law, who, together with Blair and Amsbury, are the plaintiffs in error.

The object of the action was to establish the right of the defendant in error to a one-eighth interest in certain mining claims situated in Pennington County, and known as the Holy Terror and Key Stone No. 4 Mining Claims, both lode claims, which were respectively duly located in the months of June and September, 1894, by William Franklin, under and pursuant to the laws of the United States governing the location and sale of mineral lands.

The pleadings, by proper averments, present the issues raised by the contentions of the respective parties.

A trial was had in the circuit court of Pennington County, before the judge of that court, without a jury, and in accordance with the practice prevailing in South Dakota, the trial judge made and filed findings of fact and conclusions of law upon which a judgment was entered, dismissing the complaint of defendant in error (plaintiff in the court below), upon the merits, and in favor of the plaintiffs in error (defendants in the court below), for costs. (Rec., pp. 27-28.)

A bill of exceptions was settled and a motion for a new trial was made by defendant in error, which motion was overruled by the court. (Rec., pp. 29-31.)

From the judgment of the circuit court the defendant in error appealed to the supreme court of the State of South Dakota, which court, on December 21, 1898, rendered its opinion and judgment reversing the judgment of the circuit court of Pennington county and remanding the case for a new trial. (Rec., pp. 34-39.) This opinion and judgment of the supreme court were based in part, upon a consideration of the evidence contained in the bill of exceptions.

Thereafter, on motion of plaintiffs in error, a rehearing was granted by the supreme court of South Dakota, and upon the reargument of the case it was brought to the attention of that court that the order overruling the motion for a new trial had not been entered at the time the appeal was taken. The cause being reargued, the supreme court of South Dakota held, that because the order overruling the motion for a new trial was not entered at the time the appeal was taken, that order and the evidence contained in the bill of exceptions, was not before the supreme court for consideration, and that the case must be determined upon the findings of fact made and filed by the trial judge. Upon consideration of the case on such findings of

fact, and on September 2nd, 1899, the supreme court of South Dakota rendered its further opinion and judgment, reversing the judgment of the circuit court of Pennington County and remanding the case "with directions to enter judgment, and adjudging the plaintiff to be the owner of a one-eighth interest in and to so much of the ground covered by the Holy Terror claim and the Key Stone No. 4 claim, as is embraced within the boundaries of the Tin Bar No. 1 and Tin Bar No. 2, as shown by the circuit court's findings of fact, and for his costs and disbursements in the court below." (Rec., pp. 40-41.)

Judgment was entered by the circuit court of Pennington County on the 13th day of January, 1900, in obedience to the last mentioned opinion, judgment and mandate of the supreme court of South Dakota, adjudging the plaintiff to be the owner of a one-eighth interest in certain lands specifically described in the judgment, being that portion of the Holy Terror and Key Stone No. 4 claims embraced within the boundaries of the Tin Bar No. 1 and Tin Bar No. 2 claims. (Rec., pp. 44-46.)

From the foregoing it will be seen that both the judgment of the supreme court and the judgment of the circuit court of Pennington County, sought to be reviewed, are based upon the findings of fact made by the circuit court of Pennington County, and that the evidence in the case was not before the supreme court of South Dakota and is not before this court.

The facts in the case, as appear from the findings of fact of the trial court, which are dated February 15th, 1896, are as follows:

1st. That on the 16th day of September, 1882, a portion of the ground in controversy was located as the Reed Placer Mining Claim by Jacob F. Reed and William Franklin, who were competent to make such location, and complied with all the laws of the United States and the State of South Dakota governing the location of mining claims, and who remained in the actual, notorious and peaceable possession, and were the acknowledged and reputed owners thereof until the year 1892; and during each of the intervening years, and particularly the year 1887, caused to be done upon said placer location one hundred dollars' worth of development work. (Finding 2, Rec. p. 22.)

2nd. That on the 25th day of January, 1888, Jacob F. Reed, William Franklin, Thomas C. Blair and Frank Eaton marked the boundaries of the Tin Bar No. 1 location upon the ground with stakes, as required by law, and posted a discovery or location notice thereon, and within sixty days thereafter recorded the location certificate for said Tin Bar No. 1 in the office of the Register of Deeds in and for said Pennington County, but did no other act or acts of location at the time. (Finding 5, Rec. p 23.)

3rd. That the location or discovery notice of said Tin Bar No 1 lode claim was posted at a point inside the boundary lines of the Reed placer claim, and between 150 and 200 feet easterly

of the northwesterly boundary line of said Reed placer claim; said point being also claimed as the discovery point on said Tin Bar No. 1 claim. (Finding 6, Rec. p. 23.)

4th. That the only reference to any natural object or permanent monument in the description of the Tin Bar No. 1 location, contained in the location certificate therefor, is as follows: "Said discovery shaft being situated upon said lode within the lines of said claim in Cross Mining District, County of Pennington, Territory of Dakota, and lays 400 feet to the east of the United States location No. 29 monument, and crosses Battle Creek on the southeast end, is fully staked and marked in accordance with the United States mining laws." (Finding 7, Rec. p. 23.)

5th. That during the year 1888, Frank Eaton conveyed to one Williams an undivided one-fourth interest in the Tin Bar No. 1 claim, and during the same year said Williams executed and delivered to the plaintiff and one Michael McGuire a mining deed, in due form, to said undivided one-fourth interest. (Finding 21, Rec. p. 25.)

6th. That no labor was performed or improvements made upon said Tin Bar No. 1 location, except about four days' work in 1889, and about four days' work in 1891; such work being of the value of not exceeding $14.00 in each of said years. (Finding 8, Rec. p. 23.)

7th. That there was no agreement on the part of Thomas C. Blair and William Franklin, or either of them, with the plaintiff, to perform any labor or to make any improvement on said Tin Bar No. 1 location in the year 1893 or 1894, and no contractual relations existed between said parties in regard to said Tin Bar No. 1 location at the time of the location of the Holy Terror claim on the 28th day of June, 1894. (Finding 9, Rec. p. 23.)

8th. That on the 25th day of January, 1888, Thomas C. Blair and Frank Eaton marked the boundaries of the Tin Bar No. 2 location upon the ground, with eight substantial posts or stakes, and posted a location notice upon the said claim, and within sixty days thereafter recorded a location certificate for the same in the office of the Register of Deeds in and for said Pennington County, but that they did no other act or acts of location at the time. (Finding 10, Rec. pp. 23-24.)

9th. That during the year 1888, Frank Eaton conveyed by deed, in due form, to one Williams, an undivided one-fourth interest in Tin Bar No. 2 claim, and during the same year said Williams executed to the plaintiff and one Michael McGuire, a mining deed, in due form, of said one-fourth interest. (Finding 21, Rec. p. 25.)

10th. That on April 22nd, 1890, Frank Eaton conveyed to William B. Franklin, an undivided one-fourth interest in and to said Tin Bar No. 2 claim, and Thomas C. Blair conveyed an undivided one-fourth interest therein to Jacob F. Reed. (Finding 21, Rec. p. 25.)

11th. That no labor was performed or improvements made upon the said Tin Bar No. 2 location, except about four days' labor performed thereon in 1891, of the value of not to exceed the sum of fourteen dollars. (Finding 11, Rec. p. 24.)

12th. That there was no agreement on the part of William Franklin and Thomas C. Blair, or either of them, with the plaintiff, to perform any labor or to make any improvements upon said Tin Bar No. 2 location, for and during the years 1892, 1893 or 1894, and that there were no contractual relations between said parties with reference to said location during said years. (Finding 12, Rec. p. 24.)

13th. That on November 23rd, 1892, an application was made for a patent to the Reed placer claim by the owners thereof, and that final entry of the same was made in the United States Land Office at Rapid City, South Dakota, on the 13th day of March, 1893; that there was no application for a lode aside from the placer patent. (Finding 3, Rec. p. 23.)

14th. That no adverse was filed by the plaintiff or other owners of the Tin Bar No. 1 and Tin Bar No. 2 locations to the said application for patent to the Reed Placer claim. (Finding 15, Rec. p. 24.)

15th. That at and prior to the time of the application for patent for said Reed Placer claim, to-wit: the 23rd day of November, 1892, there were no lodes or veins upon said Reed Placer claim, within the boundary lines of said Tin Bar No. 1 and Tin Bar No. 2 locations, of such a character as to render the ground more valuable because of their presence, or to justify the expenditure of money for either exploitation or development. (Finding 16, Rec. p. 24.)

16th. That in said application for patent for said Reed Placer claim, there was no application for patent for any lodes or veins included therein. (Finding 17, Rec. p. 24.)

17th. That Blair and Franklin, during the year 1891, discovered a well-defined ledge of mineral-bearing rock in place carrying gold, upon the said Tin Bar No. 2 claim, which said point of discovery was outside the limits of the said Reed Placer mining claim. (Finding 23, Rec. pp. 25-26.)

18th. That William Franklin, on the 28th day of June, 1894, filed a location certificate for the Holy Terror claim, and on the 20th day of September, 1894, an amended location certificate for the Key Stone No. 4 claim, and that said locations were both properly made and valid locations of the ground described in said certificates respectively, and that all the laws of the United States and of the State of South Dakota relating or applicable to said locations had been complied with down to the time of trial. (Finding 13, Rec. p. 24.)

19th. That the southeast end of the said Holy Terror lode claim embraces a portion of the ground covered by the northwest end of the Tin Bar No. 1,—the area in conflict amounting to 1 62-100 acres. (Finding 18, Rec. pp. 24-25.)

20th. That the southeast end of the Key Stone No. 4 location embraces a portion of the ground covered by the Tin Bar No. 2 location,— the area in conflict amounting to 2 71-100 acres. (Finding 19, Rec. p. 25.)

21st. That the location notice upon the said Tin Bar No. 1 claim was posted upon a well-defined ledge of rock in place carrying tin, but that the parties to this action had no knowledge of the existence of tin or other valuable deposits therein until after this action was commenced, to-wit: until during the trial of this action. (Finding 24, Rec. p. 26.)

22nd. That the defendants in the court below, who, or their successors in interest, are the plaintiffs in error, are the owners of the Holy Terror and Key Stone No. 4 locations, save for the rights of the plaintiff in the court below, defendant in error here, if any he has. (Finding 14, Rec. p. 24.)

23rd. That the plat introduced in evidence by the defendants, marked Exhibit 2, correctly shows the position occupied on the earth's surface by the said Reed Placer, Tin Bar No. 1, Tin Bar No. 2, Holy Terror and Key Stone No. 4 locations, and correctly shows the boundary lines of said several locations, together with the location stakes, notices, discovery shafts and workings on said claims, and correctly shows the area and extent of conflict of said locations with each other. (Finding 20, Rec. p. 25.)

A copy is here inserted of so much of this plat, Ex. 2, as shows the boundaries of the Reed Placer, the two Tin Bars, the Holy Terror and the Keystone No. 4 claims, and the extent of their interference. The boundaries of the Reed Placer are indicated by unbroken lines, those of the Tin Bars by dotted lines, and those of the Holy Terror and Keystone No. 4 by broken lines.

N
TIN BAR NO1
HOLY TERROR
TIN BAR NO2
KEYSTONE NO4
REED PLACER

Upon these facts defendant in error contended that he was entitled to an interest in so much of the land included within the Holy Terror and Key Stone No. 4 claims as lay within the boundaries of the Tin Bar No. 1 and Tin Bar No. 2 claims, upon the ground that the Tin Bar claims were valid and subsisting mineral claims at the time of the location of the Holy Terror and Key Stone No. 4,—the title thereto being then held jointly by the following named persons, in the proportions stated, viz: By the defendant in error, one-eighth; by William Franklin, Thomas C. Blair and Jacob F. Reed, one-fourth each, and by one McGuire, one-eighth. The theory of the defendant in error being that he and the persons above named were tenants in common of the Tin Bar claims at the time of the location of the Holy Terror and Key Stone No. 4 claims by Franklin, and that therefore the location of the latter claims, so far as they embraced the land covered by the Tin Bar claims, inured to the benefit of all the owners of the Tin Bar claims, in proportion to their respective interests.

Plaintiffs in error contended that no tenancy in common existed in respect of the Tin Bar claims, and that defendant in error had no interest in the Holy Terror and Key Stone No. 4 claims, upon the following, among other, grounds:

First. That both Tin Bar claims had become abandoned and forfeited and the land covered thereby subject to relocation at and before the location of the Holy Terror and Key Stone No. 4, by and because of the failure of the owners of the Tin Bar claims to perform the representation work required by Section 2324 of the Revised Statutes, and

Second. That it being expressly found that at the time of the application for patent for the Reed Placer claim there were no lodes or veins upon said claim, within the boundary lines of either of the Tin Bar claims, the Tin Bar No. 1 claim in its entirety, and the Tin Bar No. 2, so far as it lay within the limits of the Reed Placer, were extinguished and lost by the patenting of the Reed Placer claim.

In its opinions the supreme court of South Dakota adopted the contention of the defendant in error, and by its mandate directed the circuit court of Pennington County to enter judgment accordingly. To review which judgment this writ of error has been sued out.

ASSIGNMENTS OF ERROR.

The assignments of error contained in the record, so far as the same will be insisted upon in this court, are directed to the following points:

1st. That the court below erred in holding and deciding that the two Tin Bar claims were valid and existing claims at the time of the location of the Holy Terror and Key Stone No. 4 claims, and had not become forfeited and abandoned by

reason of the failure to perform thereon the work required by Section 2324 of the Revised Statutes, and that defendant in error and William Franklin were, at said time, co-owners of said Tin Bar claims.

2nd. That the court below erred in holding and deciding that the Tin Bar No. 1 claim, in its entirety, was not extinguished and lost to the owners thereof by the patenting of said Reed Placer claim.

3rd. That the court below erred in holding and deciding that so much of the Tin Bar No. 2 claim as was embraced within the boundaries of the Reed Placer claim was not extinguished and lost to the owners thereof by the patenting of the Reed Placer claim.

4th. That the court below erred in holding and deciding upon the facts found, that the location of the Holy Terror and Key Stone No. 4 by William Franklin, inured to the benefit of the defendant in error.

ARGUMENT.

I.

This court has jurisdiction, because it appears that the State Courts could not have reached the conclusion they did without deciding against a title, right and privilege set up and claimed by the plaintiffs in error, under the Statutes of the United States regulating the disposition of mineral lands.

Whenever the adjudication of a federal question is necessarily involved in the disposition of a case by a state court, this court has jurisdiction, under section 709 United States Revised Statutes, to review the decision of the state court, although it does not affirmatively appear in the record or in the opinion of the state court that such a question was raised and decided.

Kaukauna Co. vs. Green Bay, etc., Canal Co., 142 U. S., 254, and cases cited, page 269.
Roby vs. Colehour, 146 U. S., 153.

And this is true although the state court has put its decision upon other grounds.

Anderson vs. Carkins, 135 U. S., 483.

In this case, however, it does affirmatively appear from the opinions of the supreme court of South Dakota, read in connection with the pleadings and findings of fact, that the plaintiffs in

error claimed the entire and exclusive title to the premises in controversy under the provisions of chapter 6 of Title XXXII of the Revised Statutes of the United States, and that the state courts decided against the claim made by the plaintiffs in error. It also further appears that the plaintiffs in error based their denial of any right or title in the defendant in error to said premises, upon the provisions of said chapter 6, and particularly of section 2324 of the Revised Statutes, and that the contention and claim of right thus made and set up by the plaintiffs in error, was denied by the state courts.

In compliance with the second clause of rule 8, the opinions of the supreme court of South Dakota have been transmitted to this court and are in the printed record. These opinions, under the law of South Dakota, form a part of the record in the circuit court of Pennington County, to which the writ of error in this case is directed.

Section 6242 of the Annotated Code of South Dakota (Section 5217 Compiled Laws) reads: "Upon an appeal being perfected, the clerk of the court from which the appeal is taken shall, at the expense of the appellant, forthwith transmit to the supreme court if the appeal is from a judgment, the judgment roll; if the appeal is from an order, he shall transmit the order appealed from, and the original papers used by each party on the application for the order appealed from. The court may, however, in each case, direct copies to be sent in lieu of the originals. The clerk shall also, in all cases, transmit to the supreme court the notice of appeal and undertaking given thereon; and he shall annex to the papers so transmitted a certificate under his hand and the seal of the court from which the appeal is taken certifying that they are the original papers or copies, as the case may be, and that they are transmitted to the supreme court pursuant to such appeal. No further certificate or attestation shall be necessary."

And Section 6463 (Section 5238 Compiled Laws) provides: "In all cases the supreme court shall remit its judgment or decision to the court from which the appeal or writ of error was taken, to be enforced accordingly; and if from a judgment, final judgment shall thereupon be entered in the court below in accordance therewith, except when otherwise ordered. The clerk of the supreme court shall remit to such court the papers transmitted to the supreme court on the appeal or writ of error, together with the judgment or decision of the supreme court thereon, within sixty days after the same shall have been made, unless the supreme court, on application of either of the parties, shall direct them to be retained for the purpose of enabling such parties to move for a rehearing. In case such motion for a rehearing is denied, the papers shall be remitted within twenty days after such denial. The clerk of the supreme court shall in all cases, except when the order or judgment is affirmed,

also transmit with the papers so returned by him, a certified copy of the opinions of the supreme court."

These opinions, therefore, may and should be looked into to determine whether a federal question is involved.

Murdock vs. Memphis, 20 Wall., 633
Dale Tile Mfg. Co. vs. Hyatt, 125 U. S., 46-53.
Philadelphia Fire Ass'n vs. New York, 119 U. S., 110.
O'Neil vs. Vermont, 114 U. S., 343-349.
Dibble vs. Bellingham Bay Land Co., 163 U. S., 69.

In considering the two opinions rendered by the supreme court of South Dakota in this case, to determine whether a federal question is involved, it must be borne in mind that the case was heard and determined in that court upon findings of fact, which, for the purposes of the case, were and are to be considered verities.

It will be helpful to restate in a condensed form the facts upon which arise the questions of law presented for decision.

From the findings it appears that in September, 1882, Jacob F. Reed and William Franklin duly located the Reed placer claim, which included a portion of the ground in controversy; that they remained in the actual, notorious and peaceable possession thereof and complied with all the laws of the United States and of the State of South Dakota relative to such claims, down to and including the time when final entry thereof was made, in March, 1893. (Findings 2 and 3, Rec. pp. 22-23.)

That on January 25, 1888, Jacob F. Reed, William Franklin, Thomas C. Blair and Frank Eaton marked the boundaries of the Tin Bar No. 1 claim upon the ground with stakes, as required by law, and posted a discovery or location notice thereon, and within sixty days thereafter recorded the location certificate for said Tin Bar No. 1, but did no other act or acts of location. (Finding 5, Rec. p. 23.) That the location notice upon said Tin Bar No. 1 claim was posted upon a well defined ledge of rock in place carrying tin, but that the parties to this action had no knowledge of the existence of tin or other valuable deposits therein until during the trial of this action. (Finding 24, Rec. p. 26.) That the location or discovery notice of said Tin Bar No. 1 was posted at a point inside the boundaries of the Reed Placer claim, said point being also claimed as the discovery point on said Tin Bar No. 1 claim. (Finding 6, Rec. p. 23.)

That on the same day, Thomas C. Blair and Frank Eaton marked the boundaries of the Tin Bar No. 2 location upon the ground, and posted a location notice upon the said claim, and within sixty days recorded a location certificate, but did no other act or acts of location. (Finding 10, Rec. p. 23.)

That in the year 1888 the defendant in error acquired a one-eighth interest in the Tin Bar No. 1 and Tin Bar No. 2 claims through *mesne* conveyances from and under said Frank Eaton.

(Finding 21, Rec. p. 25.) That no work was performed upon the Tin Bar No. 1 claim, except about four days' work in 1889, and the same amount in 1891, being of the value of not exceeding $14 in each of said years. (Finding 8, Rec. p. 23.) That no work was performed upon the Tin Bar No. 2 location except about four days' work in 1891, of the value of not exceeding $14.00. (Finding 11, Rec. p. 24.)

That on November 23, 1892, application was made for a patent to the Reed Placer claim by the owners thereof, and that final entry was made on March 13, 1893. That at and prior to the time of the application for patent upon said Reed Placer claim, there were no known lodes or veins upon said Reed Placer claim within the boundary lines of said Tin Bar No. 1 and Tin Bar No. 2 locations, of such a character as to render the ground more valuable because of their presence, or to justify the expenditure of money for their exploitation or development. That in said application there was no application for patent for any lodes or veins. That no adverse was filed by the owners of either the Tin Bar No. 1 or the Tin Bar No. 2 locations to the said application for patent of the Reed Placer claim. (Findings 3, 15, 16, 17, Rec. pp. 23-24.)

That in June, 1894, William Franklin filed a location certificate for the Holy Terror claim, which includes 1.62 acres of the land embraced in the Tin Bar No. 1 claim, and in September, 1894, filed an amended location certificate for the Key Stone No. 4 claim, which includes 2.71 acres of the lands embraced in the Tin Bar No. 2 claim; and that all the laws of the United States and of the State of South Dakota relating or applicable to said locations, had been complied with, down to the time of trial. (Findings 13, 18 and 19, Rec. pp. 24-5.)

It is also expressly found as a fact, that there were no contractual relations between William Franklin and Thomas C. Blair, or either of them, and the defendant in error, in reference to the performance of development work upon the Tin Bar claims. (Findings 9 and 12, Rec. pp. 23-24.)

These findings of fact which, as before stated, are to be treated as verities in this case, present the following questions:

First. Whether Tin Bar No. 1 claim, in its entirety, was extinguished and lost to the owners thereof by the patenting of the Reed Placer claim.

Second. Whether the Tin Bar No. 2 claim, to the extent that it conflicted with the Reed Placer, was extinguished and lost to the owners thereof by the patenting of the Placer claim.

Third. Whether, notwithstanding the failure of the owners of the Tin Bar claims to perform thereon the work required by Section 2324, R. S., those claims continued to be valid and subsisting claims, and the locators thereof or their grantees co-tenants in respect thereto; so that one of such locators or grantees could not make a new location, for his own benefit solely, and include therein a portion of the ground covered by said Tin Bar claims although, by reason of such failure to

work, said claims had become "open to relocation in the same manner as if no location of the same had ever been made."

These questions can only be determined by the application to the established facts of a correct interpretation of the provisions of chapter 6 of Title XXXII of the Revised Statutes, particularly of sections 2324, 2333 and 2336. One construction of the provisions of this chapter will sustain the claim of the plaintiffs in error, while another construction will defeat it and sustain the claim of the defendant in error, and all dispute between the parties, both in the court below and here, was and is over the true interpretation of this statute.

There is no suggestion that the rights of the parties are in any way dependent upon the statutes of the State of South Dakota, or any local mining regulations, and it is expressly found that there were no contractual relations between the parties in interest. Nor can it be claimed that the supreme court of South Dakota decided the case upon general principles of law; but, on the contrary, the opinions of that court clearly show that its decision was founded solely upon the interpretation which it gave to the statutes of the United States governing the disposition of mineral lands.

This being so, and the state courts having decided against the title claimed by the plaintiffs in error, under the laws of the United States, this court clearly has jurisdiction, under Section 709 of the Revised Statutes, to review that decision.

Johnson vs. Towsley, 13 Wall., 72.
Pickering vs. Lomax, 145 U. S., 310.
Northern Pacific R. R. vs. Colburn, 164 U. S., 383.
Anderson vs. Carkins, 135 U. S., 483.

The case at bar is clearly distinguishable from *Blackburn vs. Portland Gold Mining Co., 175 U. S., 571*, and other similar cases where the question involved was dependent upon the existence or non-existence of controverted facts or upon matters *dehors* the federal statutes, presenting issues to be determined by general or local rules of law and which the state courts were competent to finally decide. Here the sole question at issue is the construction of federal statutes. The state court decided against the construction contended for by plaintiffs in error, and its ruling in that behalf was essential as a foundation for its judgment. The case, therefore, meets the requirements of the rule often announced by this court and concisely stated in *De Lamar's Nevada Gold Mining Co. vs. Nesbitt, 177 U. S., 523, 527*, that "To raise a federal question the right must be one claimed under a particular statute of the United States, the *validity, construction or applicability* of which was made the subject of dispute in the state court; and the decision upon such statute must have been adverse to the plaintiff in error."

II.

All rights acquired under the Tin Bar locations had become forfeited and abandoned at and before the time of the location of the Holy Terror and Keystone No. 4 claims.

Section 2324 of the Revised Statutes contains, among others, the following provisions: "On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars worth of labor shall be performed or improvements made during each year." "And upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location."

The Tin Bar claims were both located January 25, 1888. No work was performed upon the Tin Bar No. 1, except about four days work in the year 1889, and a like amount in 1891; such work being of the value of not exceeding $14 in each of said years. No work was performed upon the Tin Bar No. 2 location, except about four days in 1891, of the value of not to exceed $14. (Findings 5, 8, 10 and 11, Rec. pp. 23-24.)

It thus appears that the requirements of Section 2324 R. S., relating to the performance of work upon mining claims, were never complied with by the locators of either of the Tin Bar claims in any year; and that both claims became subject to relocation on January 1, 1889. Even if the performance of work upon the Tin Bar No. 1 in 1889, and again in 1891, and the performance of work upon the Tin Bar No. 2, in 1891, was such a resumption of work upon the claims as to save them from forfeiture and relocation, until the expiration of the year 1891, there can be no question that both claims became "open to relocation in the same manner as if no location of the same had ever been made" on the 1st day of January, 1892.

Franklin located the Holy Terror claim on June 28, 1894, and the Keystone No. 4 claim on September 20, 1894, which claims respectively included small portions of the land embraced in the Tin Bar No. 1 and Tin Bar No. 2 claims. It is not questioned and can not be doubted that the land embraced in the Tin Bar claims was subject to relocation at the dates above named. The claim of the defendant in error is that because Franklin had been associated with him in the ownership of the Tin Bar claims, a relocation by Franklin of any portion of the land covered by the Tin Bar claims inured to the benefit of all the Tin Bar owners. This claim was upheld by the supreme court of South Dakota, which court, in construing

the provisions of Section 2324, held, that notwithstanding the failure of the owners of the Tin Bar claims to perform the work required by that section, those claims continued to be valid and existing mining claims; that the relation of co-tenancy continued to exist between Franklin and the defendant in error, and that by reason of this relation, Franklin could do no act with reference to the property, whether in affirmance or disaffirmance of the validity and continued existence of the Tin Bar claims that would destroy the rights of his co-tenant, except by resorting to the process called "advertising out," prescribed by said Section 2324. The correctness of this ruling is the principal question involved in this case. We are not aware that this precise question has yet been passed upon by this court. Certainly it is not decided in any of the cases cited and relied upon in the opinion in the court below.

Section 2324 declares that where there has been a failure to perform the work required "the claim or mine upon which such failure occurred *shall be open to relocation in the same manner as if no location of the same had ever been made.*" This language is most comprehensive. But one contingency is mentioned precluding the liability to such relocation, viz: "That the original locators, their heirs, assigns or legal representatives, have * * resumed work upon the claim after failure and before such location." There is no other restriction, express or implied, and no limitation as to the persons who may relocate a claim upon which there has been a failure to perform the required labor. Were it not for the proviso above quoted, there could be no ground for contending that one of several owners of a claim upon which default had been made could not relocate the claim for his sole benefit; and it is only by giving to that proviso a construction which, notwithstanding default in the performance of work, keeps the claim alive and in existence as property, and preserves the relations of the owners thereof as between themselves to the same extent as though no default had been made, that the decision of the lower court that Franklin's location of part of the ground covered by the Tin Bar claims inured to the benefit of the defendant in error can be upheld.

It may be conceded that where fiduciary relations exist, imposing upon one person the duty of performing the prescribed labor for the benefit of another, or for their joint benefit, the person upon whom the duty rests can not relocate a claim which has been rendered subject to relocation through his own default in the performance of his duty; also, that one co-tenant can not himself perform the statutory work and take title to the mine to the exclusion of his co-tenants. Such was the case of *Turner vs. Sawyer*, 150 U. S., 578, cited and relied upon by the court below.

It may also be conceded that if one of two or more co-owners of a mining claim performs the statutory work, he does so for the benefit of all, and his remedy to obtain reimburse-

ment or to foreclose the interests of his co-owners is limited to that prescribed by Section 2324; also, that if work is resumed by one of several co-owners of a claim upon which default in the performance of work has been made, or any other act is done in recognition of the former location, or by which an advantage is sought to be obtained by reason of it, that all co-owners will be entitled to any benefits thereby secured.

But in this case nothing of the kind appears. The Tin Bar claims had been subject to relocation for more than five years; there was no resumption of work under those locations, but entirely new ones were made, covering only a small part of the old; it is expressly found that there was no obligation resting upon Franklin to keep alive the Tin Bar locations by performing the statutory work; and there can be no charge that he was guilty of any breach of duty or lack of good faith. Under these circumstances, we submit that he had as much right as any other person, upon making location of new and independent mining claims, to include within them a portion of the land covered by the Tin Bar claims. Such right can not be denied without reading into the statute an exception not there found or suggested. The language of the statute is that the claim or mine "shall be open to relocation in the same manner as if no location of the same had ever been made." This language implies a forfeiture of the rights acquired by the original locators, and the proviso which gives to the original locators the privilege of resuming work, and thus reviving the rights forfeited by default, can not be so construed as to create or preserve in them a continuing estate in the ground covered by the claim, to which the rules of law applicable to the owners of estates in lands can properly be applied. Resumption of work avoids the effect of the forfeiture and restores the rights of the locators, but the right to resume work is not an interest or estate in the land, in the ownership of which cotenancy can exist. It is merely a personal privilege extended to the locator, by which he may reinvest himself with the possessory title lost by his failure to perform representation work.

This construction of section 2324 would seem to be the only one possible, in view of the fact that that section does not provide for the acquisition of title to the land, but only for securing and retaining possession, and the steps taken under that section are not necessarily taken with a view to obtain title in fee. *Benson Mining Co. vs. Alta Mining Co.*, 145 U. S., 428-431. The requirements and limitations prescribed by section 2324 have reference merely to the initiation and preservation of the possessory right given by section 2322, which right, by that section, exists only "so long as they (the locators) comply with the laws of the United States and with the state, territorial and local regulations, not in conflict with he laws of the United States governing their possessory title."

"The interest in a mining claim, prior to the payment of any money for the granting of a patent for the land, is nothing more than a right to the exclusive possession of the land based upon a condition subsequent, a failure to fulfill which forfeits the locator's interest in the claim."

Black vs. Elkhorn Mining Co., 163 U. S., 445-450.

In a case before the Commissioner of the General Land Office in 1881, the precise question here at issue was decided in favor of the contention of the plaintiffs in error. In that case the question was thus stated: "Can one of the locators of a mining claim, upon which the necessary amount of expenditures for a given year have not been made, relocate the same as abandoned property, in his own name and for himself only?"

After quoting the provision of section 2324, the Acting Commissioner said:

"From this it will be seen that the only question to be considered in the case stated is whether one of a number of original locators, whose claim has been abandoned, would stand upon the same footing as a stranger to the first location, who, by the provisions above recited, is expressly authorized to relocate said abandoned claim.

It is clear that one of a number of locators of a certain claim can, concurrently with such joint location, locate a separate claim independently of his co-locators; and as an abandoned claim reverts to the mass of unappropriated public lands, and becomes subject to a new appropriation, *"in the same manner as if no location of the same had ever been made"*, I can see no valid objection to a new adverse location of such claim by one of the former locators."

Copp's U. S. Mineral Lands, 300.
8 Copp's Land Owner, 3.

While the question has not, so far as we know, been passed upon by the federal courts, the doctrine here contended for has been in substance upheld in several decisions in the state courts. Thus it has been held, that notwithstanding an agreement between co-tenants that one should perform the necessary work, failure to perform it rendered the land subject to relocation, and that the one upon whom the duty to perform the work rested could make a valid relocation, the only remedy of the other being an action for damages or a suit in equity to declare a trust.

Saunders vs. Mackey, 5 Mont., 523.

And where there was a failure to work and notice a claim held by several jointly, which failure, under the local mining regulations, rendered the claim open to relocation as vacant

ground, it was held that one of the tenants in common could unite with strangers in a relocation of the land, and that the other co-tenants would have no interest therein.

Strang vs. Ryan, 40 Cal., 34.

So where there had been an agreement, pursuant to which mining locations had been made but not perfected, and such agreement was dissolved, it was held that there was no obligation resting upon the parties to such agreement to perfect the locations commenced in pursuance of it, and that subsequent locations of the same ground made by some of them, were not held in trust for the others.

Page vs. Summers, 70 Cal., 121.

The only semblance of title which the locators of the Tin Bar claims or their grantees ever had to the land covered thereby was the possessory right secured to them by Section 2322 R. S., in virtue of their locations. While this possessory right existed it no doubt constituted a species of estate in the land which might be held by several persons jointly as tenents in common.

But by the terms of the statute (Secs. 2322 and 2324) the failure to perform the required work forfeited the possessory right and restored the land to the public domain. The estate itself, such as it was, being destroyed, the tenancy in common must necessarily have also ended. And with the termination of the relation the obligations arising therefrom or incident thereto likewise ceased leaving the former co-owners as free to deal with the land as strangers.

Coleman vs. Coleman, 3 Dana (Ky.), 398.
Smiley vs. Dixon, 1 Pen. & Watts, 439.
Reinboth vs. Zerbe Run Imp. Co., 29 Pa. St., 139.
Kirkpatrick vs. Mathiot, 4 Watts & S., 251.
Mace vs. Mace, 24 App. Div. (N. Y.), 291.
Wright vs. Sperry, 21 Wis., 331.
Alexander vs. Sully, 50 Iowa, 192.
Wells vs. Chapman, 4 Sandf. Ch., 312.
Sands vs. Davis, 40 Mich., 14.
Freeman on Cot. and Part., Sec. 159.

Inasmuch as any one of several locators may at any time, by merely resuming work, revive the rights forfeited by failure to perform statutory work in time, it imposes no hardship to hold that a failure to perform the work required by statute, or to resume work after there has been a forfeiture, not only renders the land "open to relocation, in the same manner as if no location of the same had ever been made," but also releases the co-owners from all obligations arising from such co-owner-

ship, the same as the recision of an express agreement was held to do in *Page vs. Summers, supra.*

On the other hand, to hold that because A. B. and C. had at one time been co-tenants of a mining claim, though they had for years failed to comply with the statutes and the claim had been open to relocation, none of them could relocate such claim or take any steps to acquire title thereto, except for the benefit of all, is to inject into the statute limitations and restrictions not expressed nor fairly to be implied, and to introduce new complications into the law respecting a subject as to which it is already greatly complicated.

Where, as in this case, there is no suggestion of unfair dealing or breach of faith, it is certain that the relocator did not intend to perpetuate the old location or to obtain any advantage by reason of it, and there had been a total failure for more than five years to perform the work required by law, there would seem to be no shadow of reason for holding that the parties who voluntarily defaulted upon the old location, can come in and claim the benefit of the enterprise and industry of their former associate, which has resulted in the discovery and development of valuable property.

III.

All rights under the Tin Bar No. 1 location and all under the Tin Bar No. 2 location, so far as it conflicted with the Reed Placer claim, were lost by the patenting of the Reed Placer.

It is found as a fact in the case, that at and prior to the time of the application for patent for the Reed Placer claim, to-wit: November 23rd, 1892, there were no lodes or veins upon said Reed Placer claim, within the boundary lines of the Tin Bar No. 1 and Tin Bar No. 2 claims, of such a character as to render the ground more valuable because of their presence, or to justify the expenditure of money for either exploitation or development. (16th finding, Rec. p. 24.) This finding, read in connection with the sixth finding, that the location or discovery notice of the Tin Bar No. 1 was posted inside the boundary line of the Reed Placer, and the 24th finding, that said location notice was posted upon a well-defined ledge of rock in place carrying tin, but that the plaintiff and defendants had no knowledge of the existence of tin or other valuable deposits therein until after this action was commenced, must be construed as meaning either that at the time of the application for patent of the Reed Placer there were no *known* lodes or veins upon that portion of the Reed Placer claim included within the boundaries of the Tin Bar claims, or that such lodes

or veins, if known, were not "of such a character as to render the ground more valuable because of their presence, or to justify the expenditure of money for either exploitation or development." In either case the findings are consistent and they establish the fact that at the time of the application for the placer patent there was no vein or lode known to exist within the boundaries of the placer claim, such as is exempted from the operation of a placer patent by Section 2333, R. S. It follows that by virtue of said Section 2333, the title to all lodes or veins within the boundaries of the placer claim passed by the placer patent.

Sullivan vs. Iron Silver Mining Co., 143 U. S., 431.
Migeon vs. Montana Central R'y Co., 44 U. S. Appls., 724.
Dower vs. Richards, 151 U. S., 658.
Deffeback vs. Hawke, 115 U. S., 392.

The fact that the Tin Bar claims had been located in part upon the ground covered by the placer claim, as found by the court below, does not, under the circumstances of this case, and in face of the express finding of the court to the contrary, establish that there were known lodes or veins within the limits of the placer claim, and bring the case within the doctrine of *Noyes vs. Mantle, 127 U. S., 348*. In that case the Pay Streak lode was discovered and duly located April 23, 1878, and was a valid, subsisting claim, entitling the owners to the exclusive possession at the time of the application for the placer patent, on December 14th, 1878. In the case at bar, the Tin Bar claims were located January 25, 1888. The statutory amount of labor was never done upon them, and no labor at all was performed later than the year 1891, so that they had lapsed and became forfeited long prior to the application for the placer patent, which was made on November 23, 1892. Thus there is a broad distinction upon the facts between *Noyes vs. Mantle* and the instant case.

It may be conceded, though it is not so found, that a sufficient discovery of mineral was made to support the location of the Tin Bar claims, and that these locations were valid at their inception, so that the locators thereof, became entitled to the exclusive possession of the ground covered thereby, so long as they complied with the requirements of the statute. But this does not show that at the time of the application for the placer patent there were veins or lodes known to exist upon the placer ground, within the meaning of that section, 2333. There is a substantial difference between the discovery of a vein or lode, sufficient to support a location within the meaning of Section 2320 on the one hand, and a lode "known to exist" within the limits of a placer claim, at the time application is made for a patent therefor under Section 2333, on the other.

One object of Section 2320 was to prescribe certain conditions upon which mining claims may be located upon the public land and a possessory right thereto secured, and it being the policy of the government, as declared in Section 2319, that all valuable mineral deposits in lands belonging to the United States shall be open to exploitation and purchase, the provisions of Section 2320 have justly received a liberal interpretation. It has always been held that to constitute a discovery of a vein or lode within the meaning of that section, it was sufficient if the locator found rock or earth in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, whether the rock or earth be rich or poor; whether it assay high or low.

Migeon vs. Montana Central Ry. Co., 44 U. S. App., 724.

Book vs. Justice, 58 Fed. Rep., 106, and cases therein cited.

But in construing the provisions of section 2333 it is evident that other questions are to be taken into consideration. This section of the statute was primarily intended for the benefit and protection of locators of placer claims. If a lode is known to exist within the boundaries of a placer claim, the applicant for a patent must state that fact, and then, by paying five dollars ($5.00) an acre for that portion of the ground, and two and 50-100 dollars ($2.50) an acre for the balance, a patent will issue to him covering both the lode and placer ground. But if the lode is known to exist and is not included within the application for a patent, then it will be construed as a conclusive declaration that the owner of the placer claim has no right of possession by virtue of his patent for the placer ground to the vein or lode. It matters not whether there is a lode or vein actually within the limits, the existence of which subsequent developments may disclose. If it is not known to exist at the time of the application, the patent for the placer claim will carry title to the lode or vein. In such cases this court has repeatedly declared that it is not enough that there may have been some indications by out-cropping on the surface of the existence of lodes or veins of rock in place bearing precious metals, even though sufficient to induce further investigation, to justify their designation as "known lodes or veins"; that in order to meet that designation, the lodes or veins must be clearly ascertained and known to be of such extent as to render the land more valuable on that account and to warrant their exploitation and development as mines.

Iron Silver Mining Co. vs. Reynolds, 124 U. S., 374-383.

U. S. vs. Iron Silver Mining Co., 128 U. S., 673-683.

Iron Silver Mining Co. vs. Mike & Starr Gold & Silver Mining Co., 143 U. S., 394-404.

Nor is it sufficient to except lodes or veins from the operation of a placer patent, that their existence was suspected or that it was commonly believed or believed by the patentee that there were such veins within the limits of the placer claim.

Sullivan vs. Iron Silver Mining Co., 143 U. S., 431.
Iron Silver Mining Co. vs. Reynolds ,124 U. S., 374.

Neither will the fact that a lode existed and had been worked for years with profit, prevent such lode from passing under a placer patent, where work had ceased prior to the application for the patent, and it was not then known that the lode was still valuable for mining purposes.

Dower vs. Richards, 151 U. S., 658.

And in another case in which the facts affecting this question were very similar to those in the case at bar, it was held that the fact that a lode claim had been located upon land covered by a placer claim, was not sufficient to show the existence of a known lode at the time of the application for the placer patent, when it also appeared that work upon the lode had been abandoned and the land had become subject to relocation before that time. In other words, that the prior location of a lode claim which has not been kept alive by performance of the annual assessment work, will not prevent such lode from passing under a placer patent, where there is no other evidence to show that a lode was "known to exist" at the time application is made for the placer patent.

Migeon vs. Montana Central R'y. Co., 44 U. S. App., 724.

In the case at bar the facts as found are:

(1) That on January 25th, 1888, the boundaries of the Tin Bar claims were marked upon the ground, discovery notices posted and within sixty days thereafter location certificates recorded, *but no other act or acts of location were done*.

(2) That the statutory amount of work was never done upon the claims, and

(3) That at the time of the application for patent to the Reed Placer claim, November 23rd, 1892, there were no lodes or veins known to exist, of such a character as to render the ground more valuable because of their presence, or to justify the expenditure of money for either exploitation or development.

Upon these facts we submit this case is governed by *Dower vs. Richards, supra, Migeon vs. Montana Central R'y. Co., supra*, and other like cases above quoted, and not by *Noyes vs. Mantle, 127 U. S., 348*.

From this it follows that the title to so much of both of the Tin Bar claims as was included within the boundaries of the Reed Placer claim passed under the placer patent, and that inasmuch as the alleged discovery point upon the Tin Bar No. 1 claim was within the limits of the Reed Placer claim, the title to the whole of that claim failed.

Gwillim vs. Donnellan, 115 U. S., 145.
Miller vs. Girard, 33 Pacific Rep., 69.

Therefore defendant in error as a former owner of the Tin Bar No. 1 is entitled to no interest in the Holy Terror; and as a former owner of the Tin Bar No. 2 is entitled to no interest in so much of the Keystone No. 4 as may lie within the boundaries of the Reed Placer.

Upon the foregoing grounds we respectfully urge that the judgment of the circuit court of Pennington County, South Dakota, should be reversed.

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BRIEF FOR PLAINTIFFS IN ERROR ON MOTION TO DISMISS

Filed Mar. 19, 1901.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 230.

EDWARD W. SPEED, AS ADMINISTRATOR OF WILLIAM B. FRANKLIN, DECEASED, ET AL.,

Plaintiffs in Error,

vs.

PATRICK B. McCARTHY,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF PENNINGTON COUNTY, STATE OF SOUTH DAKOTA.

(17,689.)

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SUPREME COURT OF THE UNITED STATES.

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Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF PENNINGTON COUNTY, STATE OF SOUTH DAKOTA.

BRIEF FOR PLAINTIFFS IN ERROR ON MOTION TO DISMISS.

The five grounds upon which defendant in error asks a dismissal of this cause present but three propositions, viz:

1. That it does not appear from the record that the plaintiffs in error specially set up and claimed in the state court a title, right, privilege or immunity under the constitution or statutes of the United States;

2. That the assignments of error are insufficient because no reference is therein made to any statute of the United States under which the plaintiffs in error claimed any title or right in the state court; and

3. That the state court based its decision on grounds independent of any federal question.

Neither in the statement of the grounds upon which this motion is based, nor in the argument of counsel for defendant in error in its support, is it denied that a federal question was, in fact, presented to and passed upon by the state court. On the contrary, it is, at least impliedly, admitted that fed-

eral questions are involved and were decided by the state court.

Anticipating that a motion to dismiss might possibly be made, we have in our brief upon the merits, already filed, discussed to some extent the question of the jurisdiction of this court to review the judgment to which this writ of error is directed, and shall here confine ourselves to replying to the argument of counsel for defendant in error in support of the motion to dismiss, begging leave to refer to our brief upon the merits in support of and to supplement the argument herein made.

I.

It does appear in the record that plaintiffs in error specially set up and claimed in the court below a title, right or privilege under the statutes of the United States.

In *Armstrong vs. Athens County, 16 Peters, 281*, six modes are pointed out in which it may appear that a right under a federal statute was claimed and passed upon in a state court, so as to give this court jurisdiction to review the decision of such state court by writ of error. The first is: "Either by express averment, or by necessary intendment in the pleadings in the case;" and the sixth, if it "appear from the record that the question was necessarily involved in the decision, and that the state court could not have given the judgment or decree which they passed without deciding it." We maintain that in this case it appears in both of these modes that the plaintiffs in error set up and claimed a right, title or privilege under the statutes of the United States governing the disposition of mineral lands.

A. In his complaint defendant in error alleged that he was the owner and entitled to the possession of an undivided one-quarter interest in and to the Holy Terror and Key Stone No. 4 lode claims. The character and sourse of his title is not stated, but it is alleged that the Holy Terror and Key Stone No. 4 claims were formerly located and known as the Tin Bar No. 1 and Tin Bar No. 2 lode claims respectively. (Record pages 15-16.)

In their amended answer the plaintiffs in error, for a third defense, make the following allegations:

"1. These defendants allege upon information and belief that the plaintiff expects and intends to establish his allegations of ownership or estate in and to the said Holy Terror Lode claim set forth in his complaint by proving or attempt-

ing to prove upon the trial of this case that the land now covered by the said Holy Terror Lode claim or some portion thereof was formerly located on the 25th day of January, 1888, under and by the name of the Tin Bar No. 1 Lode claim by Jacob F. Reed, William Franklin, Thomas C. Blair and Frank Eaton, and by proving or attempting to prove that the plaintiff thereafter acquired some interest or estate in and to the said Tin Bar No. 1 location and thereby became a tenant in common of said claim with the other locators thereof, and by proving or attempting to prove that the said Tin Bar No. 1 location was at all times thereafter a valid and subsisting mining location and was a valid and subsisting mining location at the time of the location of the said Holy Terror Lode claim, to the extent at least that the plaintiff is vested with some interest or estate in and to said subsequent location.

2. These defendants allege that if the said Tin Bar No. 1 Lode claim was a valid and subsisting lode claim in its inception, which the defendants deny, that no assessment or development work was ever done by the locators and owners thereof or any one for them during the years subsequent to the said pretended location in the year 1888, and that the said pretended Tin Bar No. 1 Lode claim and the whole thereof was forfeited and abandoned at and prior to the location of the said Holy Terror Lode claim on the 28th day of June, 1894, as hereinafter alleged.

3. That the said locators and owners of the said pretended Tin Bar No. 1 Lode claim failed to do the assessment or development work thereon required by law for the years 1889, 1890, 1891 and 1892 and 1893, and abandoned the same, and thereafter the defendant William Franklin peaceably entered upon the said ground and duly made a discovery thereon of mineral-bearing rock in place carrying gold and other valuable minerals; and on or about the 28th day of June, 1894, by the name of William B. Franklin, he duly located and appropriated the same under and by the name of the Holy Terror Lode claim, and thereafter marked the surface boundaries of the same upon the ground with eight substantial stakes, as required by law, and duly recorded the location certificate thereof in the office of the register of deeds in and for Pennington County, South Dakota, and did and performed all the said acts of location within sixty days after the date of his said discovery and within the time required by law; that the other defendants herein have since acquired an interest in and to the said Holy Terror location by purchase from the said William Franklin." (Record pages 17-18.)

For a fourth defense, similar allegations are made respecting the location of the Tin Bar No. 2 claim, the failure to perform work thereon, and the location of the Key Stone No. 4 claim. (Record pages 18-19.)

These allegations of the answer may be inartistic in form, but there can be no doubt as to the meaning of the pleader, or the grounds upon which it was intended to defend against the claim of title asserted by defendant in error. It is alleged in substance, (1) that defendant in error claimed title to an interest in the land in controversy under and by virtue of the location of the Tin Bar claims; (2) that because of failure to perform the development work required by law, both the said Tin Bar claims had become forfeited and abandoned prior to the location of the Holy Terror and Key Stone No. 4 claims; and (3) that the said Tin Bar claims, having become so forfeited and abandoned, and the ground covered thereby open to relocation, the plaintiffs in error, or their predecessors in title, located the Holy Terror and Key Stone No. 4 claims, including therein the ground in controversy.

It is true, that no specific reference is made to the statutes of the United States, but the facts are pleaded which show that the defendants in the court below claimed title to the premises in dispute as being embraced within valid mining claims, located pursuant to the laws of the United States, and that they denied the title of the plaintiff in the court below, which, as alleged, rested solely upon mineral locations, on the ground that those locations had become forfeited and abandoned by failure to comply with the conditions prescribed by the laws of the United States. This is a sufficient claim of a right, title or privilege under the federal statutes. Facts being stated presenting a case within the purview of a federal statute, and clearly showing an intent to claim its protection, it was not necessary to make a direct assertion of such intention or more particularly designate the statute relied upon.

The phrase "specially set up or claimed" used in section 709 R. S., does not mean that the particular section of the constitution, treaty or statutes need be set out at length, or designated by number or in any particular manner. It means merely that it must appear, unmistakably, that the party intends to invoke, for the protection of his rights, a provision of the constitution, a treaty or a statute.

Oxley Stave Co. vs. Butler County, 166 U. S., 648-655.

Doubtless the pleadings should be sufficiently definite to indicate the particular act of congress or part of the constitu-

tion upon which it is intended to rely, but, as said in *Bridge Proprietors vs. Hoboken Company, 1 Wall., 116-143*, "It has never been held that this should be done in express words."

In the case just referred to, it was contended that because the pleadings did not, in words, say that a statute was void because in conflict with the constitution of the United States, and did not point out the special clause of the constitution supposed to render the act invalid, the question of its invalidity was not sufficiently raised. In answer to this contention, Mr. Justice Miller uses the following language:

"It would be a new rule of pleading, and one altogether superfluous, to require a party to set out specially the provision of the constitution of the United States on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the constitution of the United States. And if the plaintiff and defendant in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court can surely recognize the fact without requiring the pleader to say in words, 'This paragraph of the constitution is the one involved in this case.'"

1 Wall., 142.

In an earlier case, where all the prior decisions were reviewed in an opinion by Mr. Justice Story, that learned judge, after stating that to give this court jurisdiction of a case brought by writ of error from a state court, it must appear that a federal question was raised and decided by the state court, said:

"That it is not necessary that the question should appear on the record to have been raised, and a decision made in direct and positive terms, *ipsissimis verbis;* but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided in order to have induced the judgment."

Crowell vs. Randell, 10 Pet., 368-398.

"No particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court."

Green Bay, etc., Canal Co. vs. Patten Paper Co., 172 U. S., 58-67.

B. But if it were doubtful whether the pleadings show a right, title or privilege specially set up or claimed under the United States statutes, it is certain that upon the whole record it appears that a federal question was raised by the plaintiffs in error and decided against them.

The material facts as shown by the findings of the trial court are, that in 1882, Jacob F. Reed and William Franklin located the Reed Placer claim; they remained in the actual and undisputed possession, and having complied with all the requirements of the law respecting such claims, made application for a patent therefor in November, 1892, and final entry in March, 1893. In January, 1888, Reed and Franklin, together with Thomas C. Blair and Frank Eaton, located the Tin Bar No. 1 claim, covering in part the same ground as the Reed Placer, the alleged discovery point being within the limits of the Reed Placer. In the same month Blair and Eaton located the Tin Bar No. 2 claim, covering part of the ground embraced in the Reed Placer, the alleged discovery point being outside the boundaries of the Reed Placer. In 1888, the defendant in error acquired a undivided ¼ interest in both the Tin Bar claims, and in 1890, Blair and Eaton conveyed to Franklin and Reed interests in the Tin Bar No. 2 claim. The development work required by section 2324 R. S., was not performed upon either of the Tin Bar claims in any year. In June and September, 1894, Franklin located the Holy Terror and Key Stone No. 4 claims, the former embracing 1.62 acres of the land covered by the Tin Bar No. 1 claim, and the latter embracing 2.71 acres of the land covered by the Tin Bar No. 2 claim. (Record pages 22-25.)

No other claim of title was shown or asserted by defendant in error to an interest in the land in controversy except such as he derived under and by virtue of the interest acquired by him in 1888 in the Tin Bar locations. His claim of title was exactly that which the defendants in the court below asserted in their answer it would be.

The supreme court of South Dakota sustained the claim of defendant in error to an interest in the land in controversy, upon the theory that at the time Franklin located the Holy Terror and Key Stone No. 4 claims in 1894, the relation of co-tenancy existed between him and the defendant in error in respect to the Tin Bar claims, and that by reason of this relation, the locations made by Franklin inured to the benefit of defendant in error, so far as they covered the ground embraced in the Tin Bar claims. To reach this conclusion, the supreme court of South Dakota necessarily had to decide, and as its opinion show did decide, that in 1894, when Franklin located the Holy Terror and

Key Stone No. 4 claims, the Tin Bar claims had not become forfeited or abandoned by the failure to perform thereon the work required by statute, but that they still existed and the locators, or their grantees, by virtue thereof, had an interest or estate in the land,—that is, that they were then property in the ownership of which the relation of co-tenancy might exist.

The opinions of the supreme court of South Dakota show that that court fully realized the necessity of first determining that the Tin Bar claims existed in 1894 as a foundation for its conclusion that Franklin and defendant in error were co-tenants in the ownership thereof. That court was not guilty of the absurdity of deciding that there could be a co-tenancy where there was no estate.

In its first opinion, after holding that the parties to this action were estopped to deny the validity of the Tin Bar locations, and that the rules of law applicable to co-tenants applied to the co-owners of mining claims, the supreme court of South Dakota said:

"Therefore, the only question to be determined in this action is whether the relation of co-tenants existed between the plaintiff (defendant in error) and Franklin when the latter located the Holy Terror and Key Stone claims." * * * "Actual possession of the claim is not essential to the validity of the title obtained by a valid location, and until such location is determined by abandonment or forfeiture, no right or claim to the property can be acquired by an adverse entry thereon with a view to the location thereof." * * * "Abandonment is always a question of intention. In forfeiture the element of intention is not involved. It rests entirely upon the statute and involves only the question whether the terms of the law have been complied with. Lapse of time, absence from the ground, or failure to work a claim for any definite period, unaccompanied by other circumstances, are not evidence of abandonment. Original locators may resume work at any time before relocation. Forfeiture is not complete until some one else has appropriated the property." * * * "*Plaintiff and Franklin continued to be co-tenants so long as the Tin Bar claims continued to exist; they continued to exist until the ground was relocated, and during every instant of that time the latter was in law incapable of performing any act in hostility to his co-tenant in reference to the joint estate.*" (Record page 38.)

It is too plain to admit of controversy that resort must be had to the federal statutes to determine whether the locator of a mining claim who has defaulted in the performance of

the required annual work continues to have a right, title or interest in the ground covered by such claim; and whether such claim still exists as property notwithstanding such default. Manifestly these are purely federal questions. That the supreme court of South Dakota considered that a federal question was involved is also certain, for further on in the opinion above quoted from, and after holding that the Tin Bar claims and the relation of co-tenancy in the ownership thereof existed at the time Franklin located the Holy Terror and Key Stone claims, that court said: "This conclusion is not precluded by the language of the federal statutes." (Record page 38.)

From these quotations it unmistakably appears that there was actually presented to and passed upon by the state court the question whether the locators of a mining claim who have failed to comply with the conditions imposed by the statutes of the United States have any right, title or interest in the land covered by the claim,—a question, the answer to which depends solely upon the construction of the federal statutes.

In the opinion it is also stated that the plaintiffs in error claimed "that the Tin Bar No. 1 discovery notice was posted within the boundaries of the then subsisting unpatented Placer claim, and that if the Tin Bar location was originally valid, the claim ceased to exist when the placer claim was patented." (Record page 36.) It being found as a fact in the case, that at the time application for patent and final entry of the Reed Placer claim were made, there were no lodes or veins known to exist upon that portion of it lying within the boundaries of the Tin Bar claims of such a character as to render the ground more valuable because of their presence, or to justify the expenditure of money for either exploitation or development (16th finding, Record page 24), this contention of the plaintiffs in error clearly raised another question determinable only by the provisions of the United States statutes governing the location of mining claims, and this question also was decided by the state court against the contention of the plaintiffs in error.

To give this court jurisdiction to review the decision of a state court under section 709 R. S., it is sufficient if it appear upon the whole record that the adjudication of one of the class of questions mentioned in that section was necessarily involved in the disposition of the case by the state court and was decided against the party seeking a review; and it is not necessary that this should appear in express terms, either in the opinion of the state court or elsewhere, if the whole

record shows that the state court could not have reached the conclusion it did without deciding such a question.

Willson vs. Blackbird Creek Marsh Co., 2 Pet., 245.
Armstrong vs. Athens County, 16 Pet., 281.
Chicago Life Ins. Co. vs. Needles, 113 U. S., 574.
Eureka Lake Co. vs. Yuba County, 116 U. S., 410.
Kaukauna Co. vs. Green Bay, etc., Canal Co., 142 U. S., 254-269.
Roby vs. Colehour, 146 U. S., 153.
Chicago, etc., Railroad vs. Chicago, 166 U. S., 226.
Missouri, etc., Ry. vs. Haber, 169 U. S., 613.

While we maintain that in this case the pleadings and the opinion of the supreme court of South Dakota do show explicitly that questions of the kind mentioned in section 709 R. S. were raised and decided in the state court, it is respectfully submitted that if this be not the case, it is apparent from the whole record that the state court could not have rendered its decision without passing upon such questions.

II.

The assignments of error are sufficient.

Though it were true, as alleged in the second ground upon which the motion to dismiss is based, that the assignments of error attached to and sent up with the writ made no reference to any statute of the United States under which the plaintiffs in error claim a right and title, this would afford no ground for dismissal. A writ of error will not be dismissed even if no assignment of errors at all is sent up with the writ.

School District of Ackley vs. Hall, 106 U. S., 428.
Gumbel vs. Pitkin, 113 U. S., 545.
United States vs. Pena, 175 U. S., 500.

But the assignments of error do refer with certainty to the statutes of the United States, the protection of which was claimed by plaintiffs in error.

The third assignment of error reads as follows: "That the said circuit court of Pennington County in rendering and entering said judgment, and the supreme court of the state of South Dakota in determining said cause and directing the entry of said judgment, erred in this, to-wit: that both in the pleadings in said case and upon the trial thereof in said cir-

cuit court of Pennington County, and in the supreme court of the state of South Dakota, it appeared and was averred and so determined, and appears in the findings of fact herein, that at a date prior to the time of the application for patent to the said Reed Placer mining claim, to-wit, the 23rd of November, 1892, there were no known lodes or veins upon said Reed Placer mining claim within the boundary lines of said Tin Bar No. 1 and Tin Bar No. 2 locations of such a character as to render the ground more valuable because of their presence, or to justify the expenditure of money for either exploration or development; that no adverse was filed by the owners of said Tin Bar No. 1 and Tin Bar No. 2 locations to the said application for patent for the said Reed Placer mining claim; that in said application for patent for the said Reed Placer mining claim there was no application for patent for any lode or veins included therein, and it was contended by these defendants in the said circuit court of Pennington County, and in the said supreme court of the state of South Dakota, that *under the statutes of the United States relating to mining claims*, by reason of said facts and of the making of the final entry of said Reed Placer mining claim and the issuing of the patent therefor, all rights of the owners of the said Tin Bar No. 1 Lode claim and Tin Bar No. 2 Lode claim became and were barred and lost, yet the said circuit court of Pennington County and the said supreme court of the state of South Dakota decided against said contention of these defendants and said judgment depends upon and is based upon said decision." (Record pages 9-10.)

In the fourth assignment it is alleged for error, that although it was alleged in the pleadings and found as a fact upon the trial, that the locators of the Tin Bar claims "failed and neglected to perform the work on the mining claims required by the statutes of the United States relating to mining claims, and it was contended by defendants that *under the statutes of the United States relating to mining claims*, by reason of the failure of the locators of said Tin Bar No. 1 Lode claim and Tin Bar No. 2 Lode claim to perform thereon *the work required by the statutes of the United States*, the said Tin Bar No. 1 Lode claim and the Tin Bar No. 2 Lode claim had become and were abandoned, null and of no effect, prior to the location of the Holy Terror Lode claim and prior to the location of the Key Stone No. 4 Lode claim, yet the said circuit court of Pennington County and the said supreme Court of the state of South Dakota decided against said contention of these defendants, and that said judgment depends upon and is based upon said decision." (Record page 10.)

In the fifth, that the state courts "erred in holding and deciding, contrary to the contention of said defendants then and there made, that *under said statutes of the United States* the location of said Holy Terror Lode claim was invalid as against the grantor of the plaintiff." (Record page 10.)

In the sixth, that the state courts "erred in holding and deciding, contrary to the contention of said defendants, then and there made, *that under said statutes of the United States* the location of said Key Stone No. 4 Lode claim was invalid as against the grantor the plaintiff." (Record page 11.)

In the seventh, that the state courts "erred in holding and deciding, contrary to the contention of said defendants then and there made, that *under the said statutes of the United States* the said Tin Bar No. 1 Lode claim was at the time of the location of the Holy Terror Lode claim a valid and subsisting mining claim." (Record page 11.)

In the eighth, that the state courts "erred in holding and deciding, contrary to the contention of the said defendants then and there made, that at the time of the location of the said Key Stone No. 4 Lode claim the said Tin Bar No. 2 Lode claim was, *under said statutes of the United States*, a valid and subsisting mining claim." (Record page 11.)

It will be seen that all of these assignments of error refer explicitly to the "*statutes of the United States relating to mining claims*" as the foundation upon which the plaintiffs in error based their denial of the claim asserted by the defendant in error, and upon which they rested their own claim of title to the ground in controversy. The brief of counsel for defendant in error in support of this motion fails to point out any defect in these assignments. The only possible criticism that we can think of is that they do not either quote the statutes of the United States referred to, or designate the particular section by number, but this, as has been shown, is wholly unnecessary. It certainly can not be claimed that there is any vagueness or indefiniteness in the reference to the statutes, or that either the court or counsel could possibly be misled.

III.

The case was not decided upon grounds independent of Federal questions.

It may be true that in determining whether the Tin Bar claims were valid in their inception, the supreme court of South Dakota did base its decision upon the ground that plaintiffs in error were estopped to allege their invalidity,

and did not pass upon the question whether those claims were invalid under the statutes of the United States because in conflict with the Reed Placer claim.

No other question, however, was decided upon the ground of estoppel. Counsel for defendant in error are mistaken in stating in their brief (page 11) that the South Dakota court also decided the question whether the Tin Bar No. 1 claim became void by the patenting of the Reed Placer upon this ground. The decision upon that point was squarely placed upon the provisions of the federal statutes, as the following quotation from the opinion will show: "If the Tin Bar claims were located when the application for patent to the placer was made, they were not affected thereby, no application for lodes having been included in the application for the placer patent. *Noyes vs. Mantle, 127 U. S., 348: Iron S. M. Co. vs. Mike & Starr G. & S. M. Co., 12 Sup. Ct. Rep., 543.*" (Record pages 36-7.) It is plain from this quotation that the court's ruling was based on the provisions of section 2333 R. S. The difficulty with the ruling is that it altogether ignores the fact expressly found by the trial court that at the time of the application for the placer patent there were no known lodes or veins within the boundaries of the Tin Bar claims. For this reason error is assigned upon the ruling and is discussed in our brief upon the merits.

It has been already pointed out that underlying the application made by the state court to the facts of this case of the rules of law governing the rights of co-tenants, is the question whether at the time the Holy Terror and Key Stone claims were located, the Tin Bar claims had any existence,—a question solely dependent upon the federal statutes, and which the state courts must have decided against the contention of plaintiffs in error before reaching the question of co-tenancy. And we have attempted to show that this issue not only was raised by the pleadings, but was directly passed upon by the state courts. What has already been said on that subject is pertinent here and need not be repeated.

If it were true, as contended by counsel for defendant in error, that the supreme court of South Dakota had ignored the federal questions and had clearly declared that they decided the case upon other grounds, that would not affect the jurisdiction of this court, since the federal questions are in the case and can not be gotten rid of by passing them over in silence or by declaring that they are not involved.

Chapman vs. Goodnow, 123 U. S., 540-8.
Chicago Life Ins. Co. vs. Needles, 113 U. S., 574-9.
Roby vs. Colehour, 146 U. S., 153-9.

Chicago, etc., Railroad vs. Chicago, 166 U. S., 226-231.
Anderson vs. Carkins, 135 U. S., 483-5.
Missouri, etc., Ry. vs. Haber, 169 U. S., 613-622.

"If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of section 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

Chapman vs. Goodnow, *supra.*

"It is immaterial that the state court considered the case to be within the provisions of certain state statutes. The grasp of the federal statute must first be released. The construction and scope of that are federal questions, in respect to which the party who claims under such statute, and whose claim is denied, has a right to invoke the judgment of this court."

Anderson vs. Carkins, *supra.*

It is respectfully submitted that the motion to dismiss should be denied.

JOSEPH V. QUARLES,
GEORGE LINES,
Counsel for Plaintiffs in Error.

JAMES W. FOWLER,
FRED H. WHITFIELD,
CHARLES QUARLES,
Of Counsel.

No. 230.

Br. of Brown & McLaughlin
(17,689.)

McLaughlin for D. C. Con mo

FEB 23 1901
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 230.

Filed Feb. 23, 1901.

EDWARD W. SPEED, AS ADMINISTRATOR OF THE ESTATE OF WILLIAM B. FRANKLIN, DECEASED, ET AL.,

Plaintiffs in Error.

vs.

PATRICK B. McCARTHY,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF PENNINGTON COUNTY, STATE OF SOUTH DAKOTA.

MOTION TO DISMISS OR AFFIRM, AND BRIEF OF ARGUMENT IN SUPPORT OF SAME.

CHARLES W. BROWN,
DANIEL McLAUGHLIN,
WILLIAM L. McLAUGHLIN,
Counsel for Defendant in Error.

(17,689.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 230.

EDWARD W. SPEED, AS ADMINISTRATOR OF THE ESTATE OF WILLIAM B. FRANKLIN, DECEASED, ET AL.,

Plaintiffs in Error.

vs.

PATRICK B. McCARTHY,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF PENNINGTON COUNTY, STATE OF SOUTH DAKOTA.

Motion to Dismiss or Affirm.

Now comes the defendant in error herein, by Charles W Brown, Daniel McLaughlin and William L. McLaughlin, his counsel, appearing in that behalf, and moves the Court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because the judgment or decree from which the said writ of error purports to have been taken is the judgment or decree of the supreme court of one of the United States, to-wit: The supreme court of the state of South Dakota; and it appears from the record in this case:

1. That the said plaintiffs in error did not specially set up or claim any title, right, privilege or immunity under the constitution or any treaty or statute of the United States.

2. That in the assignment of errors no reference is made to any statute of the United States under which the plaintiffs in error claim any title or right, and said assignments of error are therefore insufficient.

3. That the supreme court of the state of South Dakota based its decision upon grounds independent of any federal question.

4. That as to the right to locate a lode claim within the limits of a placer claim previously located, and the rights acquired

by the patenting of a placer claim, the supreme ourt of the state of South Dakota, based its decision upon the fact that plaintiffs were estopped to deny the validity of the Tin Bar No. 1 and Tin Bar No. 2 claims.

5. That as to the right of one cotenant to relocate the common property, the supreme court of the state of South Dakota based its decision, not on any construction of any federal statute, but on the general principles of the law of cotenancy.

And the said defendant in error, by counsel as aforesaid, also moves the Court to affirm the said judgment or decree from which the said writ of error purports to have been taken, because although the record in the said cause may show that this Court has jurisdiction in the premises, yet it is manifest that the said appeal was taken for delay only.

CHARLES W. BROWN,
DANIEL McLAUGHLIN,
WILLIAM L. McLAUGHLIN,
Counsel for Defendant in Error.

(17,689.)

SUPREME COURT OF THE UNITED STATES.

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EDWARD W. SPEED, AS ADMINISTRATOR OF THE ESTATE OF WILLIAM B. FRANKLIN, DECEASED, ET AL.,

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Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF PENNINGTON COUNTY, STATE OF SOUTH DAKOTA.

Notice of Submission of Motion to Dismiss or Affirm.

To James W. Fowler, Fred H. Whitfield and Charles Quarles, Counsel for Plaintiffs in Error.

PLEASE TAKE NOTICE, that on Monday, the 11th day of March, 1901, at the opening of the court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the Court thereon. Annexed hereto is a copy of the brief of argument to be submitted with said motion.

CHARLES W. BROWN,
DANIEL McLAUGHLIN,
WILLIAM L. McLAUGHLIN,
Counsel for Defendant in Error.

(17,689.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 230.

EDWARD W. SPEED, AS ADMINISTRATOR OF THE ESTATE OF WILLIAM B. FRANKLIN, DECEASED, ET AL.,

Plaintiffs in Error.

vs.

PATRICK B. McCARTHY,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF PENNINGTON COUNTY, STATE OF SOUTH DAKOTA.

Brief on Motion to Dismiss or Affirm.

Statement of Facts.

This action was commenced in the circuit court of Pennington county, South Dakota, by the defendant in error, Patrick B. McCarthy, to determine an adverse claim asserted by William B. Franklin, Thomas C. Blair, Albert Amsbury and John J. Fayel to an undivided one quarter interest in and to the Holy Terror and Keystone No. 4 lode claims, situated in Cross Mining District, Pennington county, South Dakota. Before the trial William B. Franklin died, and his administrator, Edward W. Speed, was substituted as a defendant.

On the trial the plaintiff abandoned his claim to a quarter interest in said lodes, and asserted title to an undivided one-eighth interest only.

The facts found by the trial court were as follows:

"On September 6, 1882, Jacob F. Reed and William Franklin located a portion of the ground in controversy as the Reed Placer mining claim. From the date of location until 1892 Reed and Franklin were in actual, notorious and peaceable possession of the claim, were acknowledged and reputed to be its owners, and

during each year performed the required development work. They applied for patent November 23, 18[illegible]. Final entry was made March 13, 1893. There was no application for a lode on the placer site aside from the placer claim. The boundaries of the claim as patented coincide with its boundaries as staked upon the ground at time of location. January 25, 1888. Reed, Franklin, Thomas C. Blair and Frank Eaton marked the boundaries of Tin Bar No. 1 claim upon the ground with stakes, as required by law, posted a discovery or location notice thereon and within sixty days thereafter recorded a location certificate, but did no other act of location at that time. The location or discovery notice of this claim was posted inside the boundaries of the Reed Placer claim, and the point claimed as discovery on the Tin Bar No. 1 is the same point at which the notice was posted. No labor has been performed or improvement made upon the claim, except about four days' work in 1889 and about four days' work in 1891; such work not exceeding $14 in each of those years. There was no agreement on the part of the defendants, Blair or Franklin, with plaintiff to perform labor or make improvements on Tin Bar No. 1 in 1893 or 1894, and no contractual relation existed between them in regard to such claim when the Holy Terror lode claim was located. January 25, 1888, Blair and Eaton did the same acts of location with respect to Tin Bar No. 2 that were done in respect to Tin Bar No. 1. No labor has been performed, or improvements made, upon Tin Bar No. 2, except about four days work in 1891, of value not exceeding $14. There was no agreement on the part of defendants, Franklin and Blair, with plaintiff to perform labor or make improvements upon Tin Bar No. 2 in 1892, 1893 or 1894, and there was no contractual relation existing between them in regard to such claim during those years. Defendant Franklin located the lode claims Holy Terror and Keystone No. 4 on June 28, 1894, and September 20, 1894, respectively, and the law has been complied with, so far as it relates to those claims, since the date of each. Defendan s are the owners of the Holy Terror and Keystone No 4, save for the rights of the plaintiff in this action. No adverse was filed by plaintiff or other owners of either Tin Bar No 1 or 2 to the application for patent to the Reed Placer claim. At and prior to the time of the application for patent to the placer claim there was no known lode or vein thereon within the boundaries of either Tin Bar claim of such character as to render the ground more valuable because of its presence, or to justify the expenditure of money for either exploitation or development. There was no application for patent to any lode or vein included in the placer claim in the application for patent to the placer claim. The Holy Terror embraces 1.62 acres of the ground covered by Tin Bar No. 1, and Keystone No. 4 embraces 2.71 acres of the ground covered by Tin Bar No. 2. In 1888, Eaton conveyed an undivided one-fourth interest in Tin Bar No. 1 and Tin Bar No. 2 to one, George Williams, who, in the same year, conveyed the same interest to plaintiff and one Michael McGuire. On April 22, 1890, Eaton

conveyed an undivided one-fourth interest in Tin Bar No. 2 to Franklin, and Blair conveyed a like interest therein to Jacob F. Reed. When this action was commenced, Franklin (since deceased) and defendants, Blair, Fayel and Amsbury, each owned an undivided one-fourth interest in the Holy Terror claim, and an undivided seven thirty-sixths interest in Keystone No 4. Blair acquired his interest in the Holy Terror claim with full knowledge of whatever rights the plaintiff had, if any. During 1891, Blair and Franklin discovered a well-defined ledge of mineral-bearing rock in place, carrying gold, upon Tin Bar No. 2, the point of discovery being outside the limits of Reed Placer claim. The location notice on Tin Bar No. 1 was posted upon a well-defined ledge of rock carrying tin, but plaintiff and defendants had no knowledge of the existence of tin or other valuable deposit therein until during the trial of this action in the Court below." (Trans. pp. 34 and 35)

The only difference between the Tin Bar No. 1 lode and the Tin Bar No. 2 lode so far as the questions of law are concerned, is that the point of discovery on the Tin Bar No. 2 lode was outside of the limits of the Reed Placer claim, and the point of discovery on the Tin Bar No. 1 was inside the limits of the Reed Placer claim.

Upon the trial in the circuit court of Pennington county, judgment was entered for the defendants upon the facts found by the court. (Trans. p. 27.)

From this judgment and the order denying the motion for a new trial, plaintiff appealed to the supreme court of the state of South Dakota. Upon the hearing in that court the judgment was reversed and a new trial ordered. (Trans p. 34.)

McCarthy v. Speed, 77 N. W. 590; 11 S. D. 362.

A rehearing having been ordered, the supreme court held that, as the order denying the motion for a new trial had not been entered at the time the appeal was taken, the court could consider only the errors apparent in the judgment roll, and modified its former opinion by ordering judgment entered for the plaintiff upon the findings of fact made by the trial court. (Trans. p. 40.)

McCarthy v. Speed, 80 N. W. 135; 12 S. D. 7

John J. Fayel, having died while the appeal was pending, his heirs and representatives and the heirs of William B. Franklin were brought in as defendants, and judgment was finally entered in the circuit court of Pennington county, South Dakota, in favor of plaintiff on January 13, 1900. (Trans. p. 44.)

Defendants on the first day of February, 1900, sued out a writ of error to said circuit court under § 709, Rev. Stat. U. S. to

have this judgment reviewed in the Supreme Court of the United States.

Defendant in error now moves to dismiss or affirm upon the following grounds:

1. That said plaintiffs in error did not specially set up or claim any title, right, privilege or immunity under the constitution, or any treaty, or statute of the United States.

2. In the assignment of errors no reference is made to any statute of the United States under which the plaintiffs in error claimed any title or right, and said assignments of error are therefore insufficient.

3. The supreme court of the State of South Dakota based its decision upon grounds independent of any federal question.

4. As to the right to locate a lode claim within the limits of a placer claim previously located, and the rights acquired by the patenting of a placer claim, the supreme court of the state of South Dakota based its decision upon the fact, that plaintiffs were estopped to deny the validity of the Tin Bar No. 1 and Tin Bar No. 2 claims.

5. As to the right of one cotenant to relocate the common property, the supreme court of the state of South Dakota based its decision, not on any construction of any federal statute, but on the general principles of the law of cotenancy.

Argument.

I.

In the amended answer of the plaintiffs in error they claimed upon information and belief, that the defendant in error intended to set up certain rights under and by virtue of the Tin Bar No. 1 and Tin Bar No. 2 claims, but asserted that said claims were abandoned and forfeited before the location of the Holy Terror and Keystone No. 4 claims. (Trans. p. 17.)

This is the only thing in the record, except the assignments of error, which may in any way be construed as specially setting up any title or right under the statutes of the United States, and it is not setting up the claim of plaintiffs in error but that of defendant in error.

In Florida Central and Peninsular R. Co. v. Bell, 176 U. S. 321 this court said at page 329:

"It has been several times held by this court that the plaintiff,

if the statement of his own claim does not disclose a federal question, cannot create jurisdiction in a circuit court by anticipating the defendant's claim and by alleging that the defendant will set up a defense under some law of the United States."

State of Tennessee v. Union of Planters Bank, 152 U. S. 454
Metcalf v. City of Watertown, 128 U. S. 586.
Chappell v. Waterworth, 155 U. S. 102.
East Lake Land Co. vs. Brown, 155 U. S., 488;
Oregon S. L. & U. N. R. Co. vs. Skottowe, 162 U. S. 490

In the case at bar, of course, no question of jurisdiction arose, but the principle is the same. The defendants below did not assert that their rights arose under any statute of the United States, or that the decision of the issues involved any question of the construction or applicability of any statute of the United States, and they could not, by asserting what the plaintiff below intended to prove, import a question into the record which might be claimed to give them a right to sue out a writ of error from the Supreme Court of the United States.

II.

The assignments of error in this case do not show what right or title was specially set up and claimed by defendants below, nor do they specify under what statute of the United States they now make any claim. The Court is allowed to make out for itself, if it can, what errors defendants below claim were committed, and what statute defendants' rights are supposed to be based on.

Oxley Stave Co. v. County of Butler 166 U. S., 648, this Court said:

"The words 'specially set up or claimed' imply that if a party intends to invoke, for the protection of his rights, the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare, and unless he does so declare, 'specially,' that is unmistakably, this Court is without authority to re-examine the final judgment of the state court."

Maxwell v. Newbold, 18 How. 511.
Crowell v. Randell, 10 Peters, 368.
Hoyt v. Thompson, 1 Black, 518.
Sayward v. Denny, 158 U. S., 180.
Chicago & N. W. R. Co. v. Chicago, 164 U. S., 454.

III.

We shall group the last three grounds of the motion together, and believe that it should be granted because of those grounds.

The Supreme Court of the United States will not entertain jurisdiction of state judgments where, besides the federal ques-

tion decided by the state court, there is another and distinct ground on which the judgment can be sustained.

Kennebec & P. R. Co. v. Portland & K. R. Co., 14 Wall. 23.
Rector v. Ashley, 6 Wall, 142.
Gibson v. Chouteau, 8 Wall, 314.
Klinger v. Missouri, 13 Wall., 257.
Eustis v. Bolles, 150 U. S., 361.
Missouri Pacific R. Co. v. Fitzgerald, 160 U. S., 556.
Bacon v. Texas, 163 U. S., 207.
Egan v. Hart, 165 U. S. 188.
Castillo v. McConnico, 168 U. S., 674.
Chemical Nat'l Bank v. City Bank, 160 U. S., 646.
Sherman v. Grinnell, 144 U. S., 198.
Wade v. Lawder, 165 U. S., 624.
Harrison v. Morton, 171 U. S., 38.
Pierce v. Somerset Ry., 171 U. S., 641.
Chappell Chem. & F. Co. v. Sulphur Mines Co., 172 U. S., 465.
Roby v. Colehour, 146 U. S., 153.
De Lamar's Nevada G. M. Co. v. Nesbitt, 177 U. S., 523.
Weyerhaueser v. Minnesota, 176 U. S., 550.
Moran v. Horsky, 178 U. S., 205.
Pittsburg & L. A. Iron Co. v. Cleveland Iron Min. Co., 178 U. S., 270.

In this last case this Court said:

"It is manifest that the supreme court rested its decision on the grounds: (1) that the pumping contract was a settlement of boundaries between the contestants; (2) that what was done and expended under it worked an estoppel against the plaintiff; (3) laches of the plaintiff in asserting its claim, whereby the *status quo* could not be restored.

"It requires no argument to demonstrate that neither of these grounds involves a federal question. But plaintiff in error contends that they were all made to depend upon a federal question, which the court erroneously decided, and therefore that they necessarily involve such question, * * * * * But again, and whatever the error in that conclusion (we do not assert there was any) the court decided, as an independent ground of estoppel, that plaintiff was guilty of laches, and that was sufficient to sustain its judgment."

In Moran vs. Harsky, *supra*, this court held that the defense of laches was an independent ground sufficient to sustain the judgment of the supreme court of Montana, even though a federal question was involved.

In Seeberger vs. McCormick, 175 U. S., 274, this court said:

"It has frequently been held that the contention, even if formally made, that plaintiffs in error were seeking to avail themselves of some right or immunity under the Constitution or laws of the United States, does not give us jurisdiction to review the judgment of the supreme court of a state where that judgment was

based upon a doctrine of general law sufficient of itself to determine the case"

The court quoted besides some of the cases cited above:

Beaupre v. Noyes, 138 U. S., 397.
Remington Paper Co. v. Watson, 173 U. S., 443.

In this case the federal questions which the plaintiffs in error attempt to rely on are three:

1. The discovery of the Tin Bar No. 1 lode being within the limits of the Reed Placer claim, which was previously located, said Tin Bar No. 1 lode never had any validity.

2. The discovery of the Tin Bar No. 1 lode being within the limits of the Reed Placer claim as patented, the Tin Bar No. 1 lode became void.

3. William B. Franklin, although a co-tenant with Patrick B. McCarthy in the Tin Bar No. 1 and Tin Bar No. 2 lodes, could relocate said lodes in his own name so as to exclude McCarthy from any interest in the relocated ground.

We say that the decision of the supreme court of the state of South Dakota on the first two propositions is based upon the doctrine of estoppel, and on the third proposition, upon the general principles of cotenancy. If this is true, then the writ of error should be dismissed.

Upon the first two propositions the South Dakota supreme court says:

"However this may be with respect to strangers, there is certainly no reason for holding that the owner of an unpatented placer claim cannot locate a lode claim, or consent to such a location being made by others, within the boundaries of his placer claim. Under such circumstances it would hardly be logical to regard the placer owner as a trespasser upon his own premises, and, as we shall attempt to show hereafter, the defendants are estopped from questioning the validity of the Tin Bar claims to the injury of plaintiff.

"We think the learned circuit court erred in concluding that the Tin Bar No. 1 claim was invalid in its inception because its point of discovery was within the boundaries of the placer claim. If the Tin Bar claims were located when application for patent to the placer was made, they were not affected thereby, no application for lodes having been included in the application for the placer patent *Noyes v. Mantle*, 127 *U. S.*, 348, 8 *Sup. Ct. Rep.*, 1132; *Iron Silver Mining Co. v. Mike & Starr Gold & Silver Min. Co.*, 143 *U. S.*, 394, 12 *Sup. Ct. Rep.*, 543. As to what constitutes a discovery within the meaning of the federal statutes has caused the courts no little trouble.

It might be difficult to determine, in this case, from the findings of the trial court, whether any discovery was ever made upon either Tin Bar claim; but are these defendants in position to allege or prove, as against the plaintiff, that the declarations contained in the recorded location certificates were false, and that no discoveries were, in fact, ever made? We think not. Can the locators of these claims be heard to contradict their own recorded representations, to the injury of this plaintiff? It is disclosed be the evidence that plaintiff purchased his interest in the Tin Bar claims for a valuable consideration, after an examination of thy records, relying upon the location certificates which were placed upon the public records by the locators for the purpose of selling the property as mining claims. Where one, by his conduct, intentionally causes another to believe in the existence of a certain state of facts, and induces him to act on that belief, the former is estopped from averring against the latter the existence of a different state of facts at the same time. The locators of these claims with actual knowledge of the facts, caused location certificates to be recorded, thereby representing that discoveries had been made on each, with the expectation and intention of inducing persons who might examine the records to believe that they were the owners of properly located mining claims. This conduct produced intended results. They sold an interest in the claims. Plaintiff examined the records, was induced to believe that the claims had been legally located, and acted on such belief. Whatever rights he has in this action depend upon the facts which the conduct of the locators induced him to believe existed when his interest in the claims was acquired. It would be a travesty on justice to permit the locators to now impair such rights by asserting that their recorded representations were false. Neither of the defendants is in any better position than the original locators, and all are estopped from denying the validity of the Tin Bar locations" (Trans. pp. 36, 37)

On the petition for a rehearing the Court said:

"It now appears that we cannot consider the evidence, and must base our decision upon the facts found by the court below. Its findings show that Reed, Franklin, Blair and Eaton recorded a location certificate for Tin Bar No. 1, and that Blair and Eaton recorded a location certificate for Tin Bar No. 2, in the office of the register of deeds in the proper county, before plaintiff purchased his interest in such claims; that neither defendant is in any better position than the original locators; and, whether or not plaintiff examined and relied upon the records, we think defendants are estopped from denying the validity of these locations."

If the trial court had sustained an objection to all the evidence as to the discovery of the Tin Bar No. 1 lode and the lines of the Reed Placer claim, upon the ground that plaintiffs in error were estopped from asserting the invalidity of the Tin Bar No. 1

lode, such exclusion of evidence would not have justified suing out a writ of error.

Sayward v. Denny, 158 U. S., 180.

Here in both of its opinions the supreme court of South Dakota bases its decision on the first two propositions squarely on the ground of estoppel, and hence this court is precluded by its decisions from passing upon the alleged federal questions.

In Weyerhaueser v. Minnesota, *supra*, this court said:

"Besides, whether a party in a case has been given or refused the benefit of the law of estoppel involves no federal question"

As to the third proposition the supreme court of South Dakota says:

"It being determined that, for the purposes of this action, the Tin Bar claims were valid in their inception, the main controversy is whether, when the annual assessment work has not been done upon a mining claim, one cotenant therein can relocate the same, and obtain title thereto, not only as against the world, but as against his cotenants. We are not aware that the precise question here presented has ever been decided by any court of last resort. It is well settled that cotenants stand in a certain relation to each other of mutual trust and confidence; that neither will be permitted to act in hostility to the other in reference to the joint estate; and that a distinct title acquired by one will inure to the benefit of all. This principle arises from the privity subsisting between parties having a common possession of the same land, and a common interest in the safety of the possession of each, and it only inculcates that good faith which seems appropriate to their relative position. *Venable v. Beauchamp*, 3 *Dana*, 321. It has been applied to mining property by the federal supreme court. In a case in that court, where one had acquired an interest in an unpatented claim by purchase at sheriff's sale, and obtained a patent to the entire property to the exclusion of another, who was found to own an interest therein, it was decided that the patentee held the title in trust for his cotenant; that a court of equity would enforce the trust; and that the excluded cotenant was not required to adverse the application for patent. *Turner v. Sawyer*, 150 *U. S.*, 578, 14 *Sup. Ct. Rep.*, 192. Therefore the only question to be determined in this connection is whether the relation of cotenant existed between plaintiff and Franklin when the latter located the Holy Terror and Keystone claims. 'A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent.' *Belk v. Meagher*, 104 *U. S.* 279. Actual possession of the claim is not essential to the validity of the title obtained by a valid location, and until such location is terminated by abandonment or forfeiture, no right or claim to the property can be acquired by an adverse entry thereon with

a view to the location thereof. *Belk v. Meagher*, 104 *U. S.* 279. Abandonment is always a question of intention. In forfeiture the element of intention is not involved. It rests entirely upon the statute, and involves only the question whether the terms of the law have been complied with. Lapse of time, absence from the ground, or failure to work a claim for any definite period, unaccompanied by other circumstances, are not evidence of abandonment. Original locators may resume work at any time before relocation. Forfeiture is not complete until some one else has appropriated the property. 2 *Lindley, Mines*, 644; *U. S. Rev. Stat.*, § 2324. Plaintiff and Franklin continued to be cotenants so long as the Tin Bar claims continued to exist. They continued to exist until the ground was relocated, and during every instant of that time the latter was, in law, incapable of performing any act in hostility to his cotenant in reference to the joint estate. Franklin was plaintiff's cotenant at the time he entered the boundaries of either Tin Bar claim for the purpose of relocating the ground. His entry for that purpose was hostile to his cotenant unless he intended to relocate for the benefit of all the owners of the Tin Bar claims. It may be that he owed no duty to his cotenants to represent the claims; it may be that he was at liberty to refrain from performing any act in reference thereto; but, if he elected to act at all, he was bound to act for the benefit of all the owners. His acts of relocation did not terminate the fiduciary relation between himself and plaintiff, because they were, if done for the purpose of defeating the rights of his cotenant, in hostility to his interests, and, if they were not done for that purpose, they, of course, operated to the benefit of all the owners. We think the circuit court should have adjudged the defendants to be trustees, and have enforced the trust. This conclusion is not precluded by the language of the federal statutes. They provide that upon a failure to comply with required conditions as to labor or improvements 'the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made.' *U. S. Rev. Stat.*, § 2324. It is contended that, if congress intended to have the relocator regarded as a trustee under any circumstaces such intention would have been expressed in the statute. The contention is not tenable. The trust results from the fiduciary relation of the parties, and not from the operation of the statute. If such relation exists between an original locator and another, and he secures a patent, no one will deny that he may be adjudged to hold the property in trust for such person, or if a relocator sustains such relation to a third person, the latter's rights may be enforced in equity. If this be true, there is no reason for making a different rule as to cotenants. The relocator is permitted by the statute to acquire the property in the same manner that the original locator would have acquired it, but because of his relations to another who may be a cotenant, a mortgagee, or person having no estate in the property, he will be adjudged to hold the title in trust for such person. In all cases of this

character the trust depends upon the relation of the parties, not upon the manner in which title is acquired." (Trans. pp. 37, 38 and 39.)

Here is a clear and definite declaration that the rights of defendant in error flow not from any construction or application of § 2324, Rev. Stat. U. S. to the facts of the case, but from the relation of the parties. "The trust results from the fiduciary relation of the parties, and not from the operation of the statute." And to make their meaning more clear they say: "This conclusion is not *precluded* by the language of the federal statutes." In other words, if the supreme court had said: "We base this decision upon general principles of law and not upon any construction or applicability of § 2324," their meaning would have been no plainer than it is with the language which they did use.

In Eustis v. Bolles, *supra*, this court said:

"It is likewise settled law that where the record discloses that, if a question has been raised and decided adversely to a party claiming the benefit of a provision of the constitution or laws of the United States, another question, not federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the federal question, to sustain the judgment, this court will not review the judgment."

If we apply this principle here, the motion to dismiss or affirm should be granted. The first two questions attempted to be assigned as error by the plaintiffs in error are disposed of upon the question of estoppel. The third question, the right of a cotenant in a mining claim to relocate the ground and exclude his former coowners from any ownership therein, is disposed of on the general principles of the law of cotenancy, not by the construction or applicability of § 2324. The supreme court of South Dakota mentions the statute only to show that its language does not *preclude* the doctrine which they derive from the law of cotenancy.

Respectfully submitted,

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No. 230.

Supreme Court U.S.
FILED
MAR 11 1901
JAMES H. McKENNEY,
Clerk.

Speed Brigham & McLaughlin and
McLaughlin for D. E.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

Filed Mar. 11, 1901. No. 230.

EDWARD W. SPEED, AS ADMINISTRATOR OF THE ESTATE OF WILLIAM B. FRANKLIN, DECEASED ET AL.,

Plaintiffs in Error,

vs.

PATRICK B. McCARTHY,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF PENNINGTON COUNTY, STATE OF SOUTH DAKOTA.

BRIEF OF DEFENDANT IN ERROR.

CHARLES W. BROWN,
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(17,689.)

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BRIEF OF DEFENDANT IN ERROR.

Statement of the Case.

The action comes to this court upon a writ of error to the circuit court of Pennington county, South Dakota. The action originally was tried in the circuit court of Pennington county, South Dakota, and judgment rendered for the defendants therein. An appeal was taken to the supreme court of the state of South Dakota, and that court ordered judgment to be entered for the plaintiff upon the findings of fact made by the court below. The remittitur was sent down, and in accordance with the opinion of the supreme court of the state of South Dakota judgment was entered for the plaintiff on the 13th day of January, 1901. (Transcript, page 44.)

The facts found by the court are as follows: On the 16th day of September, 1882, a portion of the ground in controversy in the

action was located as the Reed Placer Claim by Jacob F. Reed and William Franklin, both citizens of the United States, who made a discovery of placer deposit, posted a notice of location thereon, marked the boundaries of the claim properly and recorded a location certificate of the placer claim in Pennington county. From the date of the location of said Reed Placer Claim until the year 1892, the said Jacob F. Reed and William Franklin were in the actual, notorious and peaceable possession of said placer claim and were the acknowledged and reputed owners thereof: The annual assessment work for the said placer claim was done until the claim was entered for patent.

On the 23rd day of November, 1892, application for patent for the Reed Placer Claim was made and entry thereof perfected in the United States land office at Rapid City, South Dakota, on the 13th day of March, 1893. No application for a lode claim was made in the application for the placer claim.

On the 25th day of January, 1888, Jacob F. Reed and William Franklin, who were then owners in the Reed Placer Claim, and Thomas C. Blair and Frank Eaton, marked the boundaries of the Tin Bar No. 1 location upon the ground with stakes, as required by law; posted a discovery or location notice thereon, and within sixty days thereafter recorded the location certificate for the Tin Bar No. 1 Lode in the office of the register of deeds of Pennington county, but did no other act or acts of location at the time. The location notice of the Tin Bar No. 1 Lode was posted inside the boundary line of the Reed Placer Claim and between 150 and 200 feet easterly of the northwesterly boundary line of said Reed Placer Claim, and the point claimed as the discovery on the Tin Bar No. 1 Claim is the same point at which the notice was posted. The location notice upon the Tin Bar No. 1 Claim was posted upon a well defined ledge of rock in place carrying tin, but the plaintiff and defendants in the action had no knowledge of the existence of tin, or other valuable deposit therein, until after the action in the court below was commenced, to wit: until during the trial of said cause, which took place on the 17th day of January, 1896. No labor was performed or improvement made upon the Tin Bar No. 1 location, except about four days work in 1889 and about four days work in 1891, such work being of the value of not exceeding fourteen dollars in each of said years 1889 and 1891.

There was no agreement on the part of the defendants in the action below, Thomas C. Blair and William Franklin, or either of them, with the plaintiff to perform any labor or make any im-

provement on said Tin Bar No. 1 location in the years 1893 or 1894, and no contractual relation existed between said parties in regard to said Tin Bar No. 1 location at the time of the location of the Holy Terror Lode Claim on the 28th day of June, 1894.

On the 25th day of January, 1888, Thomas C. Blair and Frank Eaton marked the boundaries of the Tin Bar No. 2 location upon the ground with eight substantial posts or stakes, and posted a location notice upon said claim, and thereafter recorded a location certificate for the same in the office of the register of deeds in and for Pennington county, but did no other act or acts of location at the time. During the year 1891 said Thomas C. Blair and William Franklin, who were co-owners in said Tin Bar No. 2 Lode, together with Frank Eaton, discovered a well defined ledge of mineral bearing rock in place carrying gold upon the Tin Bar No. 2 Claim, which point of discovery was outside of the limits of the Reed Placer Mining Claim. No labor was performed or improvements made upon the said Tin Bar No. 2 Lode except about four days work performed thereon in the year 1891, of the value of not to exceed the sum of fourteen dollars. There was no agreement on the part of the defendants, William Franklin and Thomas C. Blair, or either of them, with the plaintiff, to perform any labor or make any improvements upon said Tin Bar No. 2 location for and during the years 1892, 1893 and 1894, and there was no contractual relation between said parties with reference to said location during said years.

The Holy Terror location was properly made, and was a valid location at the date of its location by the defendant, William Franklin, on the 28th day of June, 1894; and the Keystone No. 4 location from the date of the amended location certificate, to-wit: the 20th day of September, 1894, was properly made, and a valid location of the ground described in the amended location certificate thereof, and the laws of the state of South Dakota and of the United States were complied with so far as they relate to the Holy Terror and Keystone No. 4 locations from the date of the location of the Holy Terror mine and the date of the amended location of the Keystone No. 4 Lode Claim to the present time.

At the date of the trial below the owners of the Holy Terror and Keystone No. 4 locations were William Franklin, Thomas C. Blair, Albert Amsbury and John J. Fayel, save for the rights of the plaintiff in that action.

No adverse was filed by the plaintiff, or any owners of the Tin

Bar No. 1 and Tin Bar No. 2 locations to the application for patent to the Reed Placer Claim.

At and prior to the time of the application for patent for said Reed Placer Claim, to-wit: the 23rd day of November, 1892, there were no known lodes or veins upon said Reed Placer Claim within the boundary lines of the Tin Bar No. 1 or Tin Bar No. 2 locations of such a character as to render the ground more valuable because of their presence, or to justify the expenditure of money for their exploitation or devolopment.

In the application for patent to the Reed Placer Claim there was no application for patent to any lodes or veins included therein.

The southeast end of the Holy Terror Lode Claim embraces a portion of the ground formerly covered by the northwest end of the Tin Bar No. 1 Lode, the area in conflict amounting to 1.62 acres, and described as follows, to-wit: Commencing at the southeast corner of the Holy Terror Lode Mining Claim, and running thence N. 62 deg. 12 min., W. 394.6 feet; thence S. 28 deg. 0 min., W. 7 feet; thence S. 41 deg. 5 min., W. 102.1 feet; thence S. 47 deg. 57 min., E. 480 feet to the southwest corner of the Holy Terror Lode Mining Claim; thence N. 15 deg. 30 min., E. 222.7 feet to the place of beginning.

The southeast end of the Keystone No. 4 Lode location embraces a portion of the ground formerly embraced by the Tin Bar No. 2 Location, the area in conflict amounting to 2 71 acres, and described as follows, to-wit: Commencing at the southeast corner of the Keystone No. 4 Lode Mining Claim, and running thence N. 47 deg. 57 min, W. 480 feet; thence S. 38 deg. 6 min., W. 119 feet; thence S. 39 deg. 36 min., W. 92 feet; thence S. 41 deg. 50 min., E. 135.1 feet; thence S. 47 deg. 57 min , E. 446.3 feet to the southwest corner of the Keystone No. 4 Lode Mining Claim; thence N. 15 deg. 30 min., E. 252.6 feet to the place of beginning.

During the year 1888 Frank Eaton conveyed, by deed in due form, to one George W. Williams, a citizen of the United States, an undivided one-quarter interest in the Tin Bar No. 1 and Tin Bar No. 2 claims, and other property. During the same year said Williams executed and delivered to the plaintiff below, Patrick B. McCarthy, and one Michael McGuire, a mining deed in due form for the same property, to-wit: an undivided one-fourth interest in and to the Tin Bar No. 1 and Tin Bar No. 2 lodes, and other mining property. On the 22nd day of April, 1890, Frank Eaton

conveyed to said defendant, Franklin, an undivided one-fourth interest in said Tin Bar No. 2 claim, and said Thomas C Blair conveyed an undivided one-fourth interest therein to Jacob F. Reed.

Before the commencement of the action below, the defendants, John J. Fayel and Albert Amsbury, became owners in said Holy Terror and Keystone No. 4 Lode Mining Claims and at the beginning of said action said Franklin, Blair, Fayel and Amsbury each owned an undivided one-fourth interest in the Holy Terror Lode Mining Claim and an undivided seven-thirty sixth interest in the Keystone No. 4 Lode Mining Claim, save for the rights of the defendant in error.

Upon these facts and upon the assignments of error which were filed in this case, but two questions arise. The first and main question in the case is, whether one co-owner in a mining claim can relocate the same when the annual labor has not been performed so as to exclude his co-owners from any interest in the ground. The second question is, whether the owners of a placer claim, who locate a lode claim within the boundaries of the placer claim, properly record their location certificate, and hold out to the world that they are the owners of the ground by reason of the lode claim, can, even after patent has issued for the placer claim, assert that there was no discovery upon said lode; and that by reason of the discovery having been patented within the placer claim all rights under the lode location are gone. This second question does not affect the ground included within the limits of the Tin Bar No. 2 Lode because there was a discovery of a well defined ledge of rock in place, carrying gold, made within the limits of the Tin Bar No. 2 Lode, outside of the boundaries of the Reed Placer Claim.

BRIEF OF ARGUNENT.

I.

Where the annual assessment work upon a mining claim has not been performed, can a co-owner relocate the ground so as to deprive his co-owners of any interest therein?

The main controversy raised by the assignments of error in this case and the one upon which all other propositions depend, is, whether, when the annual assessment work has not been done upon a mining claim, one co-tenant therein can relocate the same

and obtain title thereto, not only as against the world, but as against his co-tenants. Our proposition is, that when a co-tenant attempts to relocate ground upon which the annual assessment work has not been done the location is valid, but he at once becomes a trustee for his co-tenants to the extent of their interest in the old location. The 10th and 23rd findings of fact, made by the court below, show that the Tin Bar No. 2 Location was a valid existing mining claim, because all the necessary acts of location were performed by the locators, and the discovery of a well defined ledge of mineral bearing rock in place, carrying gold was made by the locators during the year 1891, which discovery was outside the limits of the Reed placer claim. As to the Tin Bar No. 2 Lode, therefore, the only question which arises is, could Franklin and Blair relocate said lode as the Keystone No. 4 and deprive their co-tenant, McCarthy, of his interest in said lode? The same proposition arises as to the Tin Bar No. 1 Lode. The court below found, in the 21st finding of fact, that an undivided one eighth interest in the Tin Bar No. 1 and No. 2 lodes had been conveyed to the plaintiff below, and that Blair and Franklin were co-owners in said lode with him.

It would seem that this court had settled the question in favor of the defendants in error by its decision in the case of Turner v. Sawyer, 150, U. S 578; 14 Sup. Ct. Rep. 192. In that case the Supreme Court says:

"It is well settled that co-tenants stand in a certain relation to each other of mutual trust and confidence; that neither will be permitted to act in hostility to the other in reference to the joint estate; and that a distinct title acquired by one will inure to the benefit of all. A relaxation of this rule has been sometimes admitted in certain cases of tenants in common, who claim under different conveyances and through different grantors. However that may be, such cases have no application to the one under consideration, wherein a tenant in common proceeds surreptitiously, in disregard of the rights of his co-tenants, to acquire a title, to which he must have known, if he had made a careful examination of the facts, he had no shadow of right. We think the general rule as stated in Bissell vs. Foss, 114 U. S. 252-259; 5 Sup. Ct. Rep. 851, should apply; that 'such a purchase (of an out-

standing title or incumbrance upon the joint estate for the benefit of one tenate in common) inures to the benefit of all, because there is an obligation between them, arising from their joint claim and community of interest, that one of them shall not affect the claim to the prejudice of the others.' *Rothwell v. Dewees*, 2 *Black*, 613. *Van Horn v. Fonda*, 5 *Johns. Ch.* 388. *Lloyd v. Lynch*, 28 *Pa., St.* 419. *Downer vs. Smith*, 38 *Vt.* 464. A title thus acquired the patentee holds in trust for the true owner, and this Court has repeatedly held that a bill in equity will lie to enforce such trust. *Johnson v. Towsley*, 13 *Wall.* 72. *Moore v. Robbins*, 96 *U. S.* 530. *Marquez v. Frisbie*, 101 *U. S.* 473. *Rector v. Gibbon*, 111 *U. S.* 276. *Monroe Cattle Company v. Becker*, 147 *U. S.* 47."

The Civil Code of of the state of South Dakota, also supports this contention. Sections 3915, 3919, 3920, 3921, 3923, 3927, Compiled Laws, South Dakota (1887), are as follows:

"§ 3915. Everyone who voluntarily assumes a relation of personal confidence with another, is deemed a trustee within the meaning of this chapter, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires informatihn which was given to such person in the like confidence, or over whose affairs he, by such confidence, obtains any control.

§ 3919. One who wrongfully detains a thing is an involuntary trustee thereof for the benefit of the owner.

Sec. 3920. One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.

§ 3921. In all matters connected with his trust a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter, by the slightest misrepresentation, concealment, threat or adverse pressurs of any kind.

§ 3923. Neither a trustee, nor any of his agents, may take part in any transaction concerning the trust, in which he, or anyone for whom he acts as agent, has an interest, present or contingent, adverse to that of his beneficiary, except as follows:

1. When the beneficiary, having capacity to contract, with a full knowledge of the motives of the trustee, and of all other facts

concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so.

2. When the beneficiary, not having power to contract, the circuit court, upon the like information of the facts, grants the like permission; or,

3. When some of the beneficiaries having capacity to contract, and some not having it, the former grant permission for themselves, and the circuit court for the latter, in the manner above prescribed.

§ 3927. Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of the trust."

Mr. Morrison in his Mining Rights, eighth edition, page 83, says:

"The question, therefore, whether a single co-tenant can relocate at all, for his own benefit, before the case of *Turner v. Sawyer*, 150 *U. S.* 578, was decided, was somewhat in doubt. * * * The case of Turner v. Sawyer, above cited, lays down the true principle applicable to the case, to-wit: that a co-tenant cannot acquire and hold adversely a hostile title without allowing the right to a co-tenant to pay his proportion of the costs, and take the benefit of the same, and that perfecting patent was the purchase of such a title."

Mr. Wade in his American Mining Laws at page 58, Sec. 32, says:

"It has been decided that one of several co-owners of a mine, upon which there has been a failure to perform the amount of labor required by district rules, might treat it as abandoned property and relocate it in the name of himself and others, and thus appropriate the interest of a co owner who failed to contribute. The authority of this case is questionable even under district rules that did not render the failure to perform labor *ipso facto* an abandonment of the claim. There is no doubt that it would be inapplicable under the law of congress governing the question of forfeiture, and prescribing the method by which it might be taken advantage of by co-owners. That provides that for failure to contribute his proportion of the expenditures he will be subject to the process which is popularly known as "advertising out." That is, by notice served personally or by publication, and after

the expiration of ninety days after such a service is complete, and a continued failure to respond, his interest is divested and passes to his co-owners who have made the required expenditure."

Mr. Lindley in his Work on Mines says:

"Relocation by one of several original locators in hostility to the others.

If we are right in the conclusions reached in the preceding section, that the original locator cannot plead his failure to perform or resume work as the basis of a valid relocation, it must necessarily follow, that one of several locators seeking to obtain the entire title by reason of the failure of any of them to fulfil the requirement of the law, is likewise prohibited from making such relocation.

The supreme court of Montana has held that mining claims owned by several in common must be 'represented' that is, the work must be performed—as if owned by one person; that representation is a unity; that co-owners may cause representation work to be done on the claim according to their respective interests, but when completed, it must amount to one whole representation; otherwise, the claim is not protected from relocation, and that under such circumstances, one of the co-owners might relocate. *Saunders v. Mackey*, 5 *Mont.* 523. But we think that this doctrine is opposed to the views of the Supreme Court of the United States, announced in *Turner v. Sawyer*, 150 *U. S.* 578, wherein it is said that the general rule, that the purchase of an outstanding title or incumbrance, upon the joint estate for the benefit of one tenant in common inures to the benefit of all, because there is an obligation between them arising from their joint claim and community of interest, that one of them shall not affect the claim to the prejudice of others, should apply to a case where one co-tenant of a mining claim secures the entire title in his individual name. See also Freeman on Cotenancy. Sec. 151.

The courts generally concede the rule to be, that where one of several co-owners in a mining claim applies for a patent in his own name, the excluded co-tenants are not adverse claimants within the meaning of the law requiring them to intervene in patent pro-

ceedings, as they claim equities which are based upon the legal title thus conveyed. *Suessenbach v. First National Bank*, 5 *Dak.* 477; *Brundy v. Mayfield*, 15 *Mont.* 201; *Doherty v. Morris*, 11 *Col.* 12. Be that as it may, although the views announced by the supreme court of Montana seems to give support to the doctrine of the supreme court of Utah, cited in the preceding section, we cannot see why the reason applied by us in that section to the case of an individual locator should not apply with equal force to one of several locators. In the latter case, the obligation rests upon all alike to perform the required work. One of the co tenants might save the entire estate by himself performing the labor. In such event, he would have a right of contribution against his co-tentants for their proportion of expenditures made to save the common estate, which he might assert, either in an action for partition, or, perhaps, by 'advertising out' under the provisions of the Revised Statutes. But to say that one co owner can make his own delinquency, as well as that of his co-tenants, the basis for acquiring a new title, seems to us repugnant to the intent and spirit of the law."

1 *Lindley on Mines, Sec.* 406.

In *Mills, et al. v. Hart, et al.*, (*Col.*) 52 *Pac.* 680, it was held:

"A purchase by the individual defendants, or some of them, of an interest in the locations of April 13, 1880, would make the defendants thus purchasing and the plaintiffs co-owners in these locations. During the existence of this relationship, a purchase by such defendants of the title initiated by the relocations of January 2, 1882, would inure to the benefit of their co-owners in the original locations. A purchase by the company from such defendants, with notice of the rights of plaintiffs, would vest the title in the former, burdened with the equities of the latter therein; and the title thus held by the company would be in trust for the plaintiffs to the extent of their interest in the premises."

In this particular case the plaintiffs were co-owners with the grantors of defendants in the Nevada and Champion lodes. These lodes were relocated by other parties and some of the co-owners in the lodes purchased the relocations. An amended location certificate was filed in which the two lodes were included as one,

named the Champion, and no rights acquired under the relocations were waived. A patent was thereupon issued for the Champion Lode. It will be seen that the facts in that case were very similar to the facts in this.

The cases which are cited as opposed to the views of the Supreme Court of the United States and of these eminent authors on mining laws are, *Strang v. Ryan*, 46 *Cal.* 34; *Saunders et al. v. Mackey*, 5 *Montana*, 523; 6 *Pac.* 361; *and Doherty v. Morris*, 16 *Pac. Rep.* 911.

The Strang case arose under district rules. The question is not squarely raised and the opinion of the court is criticized by Mr. Wade, Mr. Morrison and Mr. Lindley. In *Saunders v. Mackey*, 5 *Mont.* 523; 6 *Pac.* 361, there was an attempt by the co-tenant to claim under the old location, and not to have an interest in the new location, which is a different case entirely from the present one. In that case the court says at the close of the opinion: "If the respondent has violated his contract he is liable to damages for a breach thereof, and if the relations between him and Julia D Saunders were such as to make him her trustee in the location of the Baltimore Claim, a proper action would so declare him and protect her interest therein: but there is nothing in the complaint to invalidate the Baltimore location and claim." So that this case would really support the doctrine for which we contend.

In the case of *Doherty v. Morris*, (*Col.*) 16 *Pac.* 911, it is simply held that in an adverse suit one cannot assert an equitable title to the lode which he attacks by his adverse.

The general doctrine of the cases is that one sustaining fiduciary relations to another cannot relocate such beneficiary's claims.

Suessenbach v. Bank, 41 *N. W.* 662; 5 *Dak.* 477.
Sawyer v. Turner, 16 *Mining Reports*, 260, *per Hallet J.*
Hunt v. Patchen, 35 *Fed.* 816.
Rollin v. Lockhart, (*Idaho*), 21 *Pac.* 413.
Lakin v. Sierra Buttes G. M. Co. 25 *Fed.* 337.
Utah, etc. Co. v. Dickert etc. Co. (*Utah*), 21 *Pac.* 1002.
Clement v. Cates, (*Ark.*) 4 *S. W.* 776.

The reasons for the rule seem to us very strong, even if the de-

cision of the Supreme Court of the United States had never been made. The opinion of the circuit court and the contention of the plaintiffs in error in this case are based upon the theory that whenever the annual assessment work is not done upon a claim it becomes at once a nullity, and, therefore, the relation of co-tenancy ceases, and thereafter the co-tenants owe each other no further duty. This view of the court and of the plaintiffs in error is not warranted by the statute or by the decisions.

Section 2324 of the Revised Statutes of the United States provids for the annual work to be done upon mining claims and then proceeds: "and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation, in the same manner as though no location of the same had ever been made; provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location." Then follows a provision by which one co owner, who may do the work upon the claim, can acquire the interest of the other owners by what is known in mining countries as "advertising out."

It will be seen that the claims do not become a nullity by the mere failure to do the work. The owner may resume work at any time and the claim is then as valid as it ever was. Two things are necessary before the claim becomes a nullity; there must be a failure to do the annual assessment work, and there must be a taking advantage of this failure by someone else.

The Supreme Court of the United States in the celebrated case of *Belk v. Meagher*, 104 *U. S.* 279, says:

"The argument on the part of the plaintiff in error is, that if no work was done before January, 1875, all rights under the original claim are gone; but that is not, in our opinion, the fair meaning of the language which congress has employed to express its will. As we think, the exclusive possessory rights of the original locator and his assigns were continued, without any work at all, until January 1, 1875, and afterwards if, before another entered on his possession and relocated the claim, he resumed work to the extent required by law. His rights after resumption were precisely what they would have been had no default occurred."

In *Oscamp v. Crystal River M. Co.* (*C. C. A. 8th Circuit*) 58 *Fed.* 293, the court says:

"In *Belk v. Meagher*, 104 *U. S.* 279, 283, it was held, after much consideration, that a mining location, when perfected according to the statutes of the United States and local laws and regulations, 'is property in the highest sense of that term, which can be bought, sold and conveyed and will pass by descent,' and that there is nothing in the lawunder which such property is acquired 'which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location than it is for the protection of any other grant from the United States.' It was furthermore held in that case that a failure to do the requisite amount of annual development work on a claim under Sec. 2324 of the Revised Statutes of the United States simply renders the claim subject to relocation by third parties, after the lapse of the year, and not before, and that such right of relocation is itself lost, and the original owner is restored to all of his rights if he enters without force and resumes work, before a relocation is perfected by any third party. * * * The necessary conclusion seems to be that neither the failure of the owner to occupy or to work his claim during a given year will operate to divest him of his title, and to confer it upon another. A failure to work a claim to the extent required by the statute simply entitles a third party to relocate it in the mode pointed out by existing laws, and, as the statutes of Colorado prescribe the mode in which third parties may divest the title of the original owner by a relocation, if the statutes in that respect are not pursued, the status of all persons remains unaltered, barring the possible effect of limitations or laches; and if at any time the original owner re-enters and resumes work, the right of relocation is then lost."

The same doctrine is laid down in the following cases:

Justice Mining Co. v. Barclay, 82 *Fed.* 554.
Klopenstine v. Hays, 57 *Pac.* 712.
Lakin v. Sierra Butte M. Co. 25 *Fed.* 337.
Jupiter M. Co. v. Bodie Con. M. Co. 7 *Sawy.* 93 11 *Fed.* 666.
North Noonday M. Co. v. Orient M. Co. 6 *Sawy.* 301; 1 *Fed.* 522.
2 *Lindley on Mines*, § 644.

When a co-tenant goes upon the ground, and undertakes to make a relocation by taking advantage of a discovery formerly made, all of his acts will be presumed to be for the benefit of his co-tenants. He had the right by merely resuming work to avoid

any forfeiture of the claim; if, instead of resuming work as he should have done for the benefit of those owning with him, he makes a relocation of the claim, and if the location is valid it will inure to the benefit of those owning in the old location. This rule is supported by the provisions of the statute itself, because congress has provided a method by which one owner can obtain the rights of his co-owners; and congress having provided this method, it is clear that there is no other method by which an owner can divest the other owners of their interest in the claim. If the work has not been done upon a mining claim, the tenant who has thought it of sufficient value to justify the expenditure upon it can give notice to his partners of his expenditure, and if, within ninety days they fail to pay their share, their interest at once passes to the owner who has performed the work.

The doctrine which we contend for is supported by the decision of the Supreme Court of the United States, by the act of congress, by three distinguished authors upon mining law, by the well settled principles of the law of co-tenancy, and by every dictate of justice and fair dealing,

II.

Can a lode claim be located within the limits of a valid placer claim, provided it can be done peaceably?

Section 2329 of the Revised Statutes of the United States provides:

"Claims usually called 'placers,' including all forms of deposits, *excepting veins of quartz or other rock in place*, shall be subject to entry and patent, etc."

It will be seen that the very statute which authorizes the location of a placer claim, excepts veins of quartz or other rock in place from the grant, and these do not, under sections 2329 and 2333, pass by such grant, if known. An explorer can, therefore, go within the limits of the placer claim and locate a lode thereon, provided he do so without a breach of the peace.

1 *Lindley on Mines*, § § 413, 414 *and* 415.
Mt. Rosa Mining M. & L. Co. v. Palmer, (*Colo.*) 56 *Pac.* 176.

Mr. Lindley says:

Right ... appropriate lodes within placers. That the two classes of mineral deposits, those falling within the designation of lodes, or veins, and those usually called placers, frequently exist in the same superficial area is a matter of common experience. That when so found they may be held by the same or different persons, is well settled by both judicial and departmental decisions.

. While it is undoubtedly true that a mining location, whether lode or placer, is property in the highest sense of the term, and when perfected is equivalent to a grant from the government, yet it does not follow that the thing granted is the same in both classes of locations, nor that things reserved from the operation of one grant are likewise excepted from the operation of the other.

There is a marked distinction between the surface rights acquired by a lode location and those flowing from a placer location. In the former there is a grant of the exclusive right of enjoyment of the surface and everything within vertical planes drawn downward through the surface boundaries, subject only to the extralateral right of outside apex proprietors to pursue their veins underneath such surface. No subsequent locator, either lode or placer, can invade such surface. On the other hand, lodes found within the placer surface or underneath it, if their existence is known prior to the application for placer patent, are not the subject of a placer grant. Therefore, the placer claimant may not own everything upon the surface or found within vertical planes drawn downward through the surface boundaries. The policy of the government with reference to lodes is, to sever them from the body of the public lands, and to deal with them and the land immediately enclosing them as separate and distinct entities.

The location of mining ground for placer purposes does not effect such severance. The placer claimant *may*, in the absence of a discovery and location by others, obtain the title to the lode, but he has not such right by virtue of his prior placer appropriation. This right to appropriate the lode must flow from the dis-

covery of the *lode*. Whosoever first discovers the lode may appropriate it by complying with the laws conferring privileges upon such discoverers. If he fails to do so, it is open to the next comer; and this rule applies to the placer claimant as well as to strangers. If, having discovered it, he fails to manifest his intention to *claim* it by appropriating it under the lode laws, it may be the subject of appropriation by others, the same as if it were upon the public domain; *provided*, always, that such appropriation is made and perfected peaceably and in good faith. In this respect, the same rules of law which govern the location of mineral land occupied or claimed by others under inchoate agricultural holdings, are to be applied. We have fully discussed this element in preceding articles. It is unnecessary here to repeat what is there said. * * * * We are justified in deducing from the foregoing the following conclusions:

(1) A perfected placer location does not confer the right to the possesssion of veins, or lodes, which may be found to exist within the placer limits at any time prior to filing an application for a patent;

(2) Such lodes may be appropriated (a) by the placer claimant, or (b) by others, provided the appropriation is effected by peaceable methods and in good faith;

(3) Where a lode is known to exist within the limits of a placer location at any time prior to the placer application for patent, and is not claimed in the application as a *lode*, the title to such lode does not pass by the patent, but it may be located by any one having the requisite qualifications, provided the location is made peaceably and in good faith.

Manner of locating lodes within placers.

With the exception of determining the quantity of surface which may be taken in conjunction with a lode found within a placer claim, a question to be presented in the next section, there is no difference between the manner of locating such a lode and any other found within the public domain. * * * * But let us assume the case of a lode discovered within a prior placer claim by a stranger to the placer title, such discovery ante-

dating the application for a placer patent. That such lode may be located and claimed by the discoverer seems to be well settled. But the extent of surface to which such locator may be entitled, with due regard to the rights of the prior placer claimant, is the subject of debate. The question assumes this form: What is in contemplation of law reserved out of a placer location? or, to what extent is the surface of a prior placer location subject to invasion and delimitation by a subsequent discovery of a lode within the placer boundaries? * * * The conclusion seems logical, that if a lode within a placer is subject to appropriation at all, it may be appropriated the same as if it were situated elsewhere. The placer claimant locates with the full knowledge that a lode discovered within the limits of his claim will not belong to him by virtue of his placer location; and that when such is discovered it may be located by those whose rights can only be defined by end and side lines carving out of the placer a surface area. The government says to him, in effect: 'You may locate this ground which appears to be placer, but you do so with the distinct understanding, that if a lode is discovered therein before you apply for a patent, such lode shall belong to him who first discovers and locates it. Such discovery will entitle the discoverer to all privileges which are accorded with respect to lodes found elsewhere on the public domain.'"

1 *Lindley on Mines*, §§§ 413, 414 *and* 415.

In *Mt. Rosa Mining M. & L. Co. v. Palmer*, (*Colo.*) 56 *Pac.* 176, the court says:

"Since a patent conveys to the placer locator no other or different rights than those acquired under the location, it inevitably follows from the doctrine thus announced, that he has no possession, and acquires no right to any lodes known to exist within his claim, by virtue of his placer appropriation. In *Aurora Lode v. Bulger Hill & Nugget Gulch Placer*, *supra*, (23 *Land Dec.* 95) Secretary Smith, in discussing the rights acquired by the placer locator, said: 'Such a location, in and of itself, does not establish any right in the claimant under it to the superficial area within its boundaries, except as a placer claim or mine. Of its own force it cannot operate to give title to or property rights in any veins or lodes within its boundaries. True, a placer mining claim be-

comes property, as such, by discovery and location, the same as a vein or lode claim, but it cannot and does not, of itself, in any sense, give title to or property rights in veins or lodes; nor can it, in my judgment, operate to preclude a subsequent lawful discovery and location of veins or lodes within its boundaries.' And Mr. Lindley, in his admirable work on Mines, after an elaborate and thorough discussion of the question, deduces the following conclusions:

'(1) A perfected placer location does not confer the right to the possession of veins or lodes which may be found to exist within the placer limits at any time prior to filing an application for a placer patent;

(2) Such lodes may be appropriated (a) by the placer claimant, or, (b) by others, provided the appropriation is effected by peaceable methods and in good faith.'

While we recognize to its full extent the rule that precludes the initiation of a right by a trespass upon the lawful possession of another, we think, under the established facts in this case, appellant is not in a position to invoke its protection. The lodes in question were known to exist prior to the application for patent, and, appellant not having taken the necessary steps to obtain possession of them, they were open to location by others at the time they were located by the grantors of appellee. *In making the locations, no right of appellant was invaded, and their validity, therefore, is in no way affected by the fact that they were made within the surface boundaries of a prior placer location.*"

But if this were not true the locators of the Reed Placer Claim, having themselves joined in the location of the Tin Bar No. 1, certainly abandoned so much of the placer claim as conflicted with the Tin Bar No. 1, or acquiesced in its location, and are now estopped to dispute the validity of the Tin Bar No. 1 Location within the limits of the Reed Placer Claim.

McCarthy v. Speed, 77 *N. W.* 590; *s. c.* 11 *S. D.* 362.
McCarthy v. Speed, 80 *N. W.* 135; *s. c.* 12 *S. D.* 7.
Eichelberg v. Soper, 1 *S. D.* 563.
Parliman v. Young, 2 *Dak.* 185.
Bostwick v. Benedict, 4. *S. D.* 414; 57 *N. W.* 58.
Liberty Township v. Hutchinson, (*S. D.*) 64 *N. W.* 1117.

J. I. Case v. Pederson, 60 *N. W.* 747.
Evanston v. Webster, 3 *S. D.* 383.
Tollerton & Stetson Co. v. Casperson, (*S. D.*) 63 *N. W.* 908.
Brooms' Legal Maxims, 168.
Bigelow on Estoppel, 542-642.
U. S. v. Lamont, 165 *U. S.* 303;
Maricopa etc. R. R. Co. v. Arizona, 156 *U. S.* 347.

So far as the discovery of the Tin Bar No. 1 is concerned, in addition to this the finding is ample that the discovery was made upon a well defined lode or vein of rock in place carrying tin; but the court finds that this was not known to the locators until at the time of the trial below, although they posted their location notice upon this lode or vein, called it the Tin Bar No. 1 Lode, and worked upon it as a lode claim. The plaintiffs in error are clearly estopped to assert the invalidity of their own location, having placed their location certificate upon record, and having deeded an interest therein, which passed by regular conveyances to the defendant in error. But if they were not so estopped, this finding of the court upon the discovery of the Tin Bar No. 1 is sufficient to show a valid discovery.

A paying lode or vein need not be discovered to entitle a locator to a valid location, but it is sufficient if the lode contains such indications of mineral that he is willing to spend his time and money in anticipation of finding ore sufficiently valuable to work.

Shreeve v. Copper Bell Mining Co., (*Mont.*) 28 *Pac.* 315.
Burke v. McDonald, (*Idaho*) 29 *Pac.* 98.
Werner v. McNulty, (*Mont.*) 14 *Pac.* 643.
Book v. Justice Mining Co. 58 *Fed.* 161.
Hyman v. Wheeler, 29 *Fed.* 347.
Golden Terra M. Co. v. *Smith*, 2 *Dak.* 402.
Harrington v. Chambers, 3 *Utah*, 94.
Montana Central Railway Co. v. *Migeon*, 68 *Fed.* 811.

Section 2001, Compiled Laws, South Dakota, (1887) is as follows:

"Before filing such location certificate the discoverer shall locate his claim by first sinking a discovery shaft thereon sufficient to show a well defined mineral vein or lode; second, by posting at

the point of discovery, on the surface, a plain sign or notice, containing the name of the lode, the name of the locator or locators and the date of discovery, the number of feet claimed in length on either side of the discovery, and the number of feet in width claimed on each side of the lode; third, by marking the surface boundaries of the claim."

The statute of South Dakota is taken from Colorado, where a discovery shaft ten feet deep was required before the discovery was valid, but that provision of the Colorado statute was left out, as borrowed by us, and we never had such a provision until the passage of Chapter 115, of the laws of 1899, of the state of South Dakota.

More than this, in the amended answer in the case the plaintiffs in error alleged the forfeiture of the Tin Bar No. 1 lode claim by reason of failure to do the work thereon.

The allegation of forfeiture is an implied admission of the validity of the first location.

Belk v. Meagher, 104 *U. S.* 284.
Willis v. Blain, 20 *Pac.* 798.
Providence G. M. Co. v. Burke, 57 *Pac.* 641.

III.

The patenting of the Reed placer claim in no wise affected the validity of the Tin Bar No. 1.

Section 2319 of the Revised Statutes of the United States is as follows:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase."

Section 2329 of the Revised Statutes of the United States is as follows:

"Claims usually called 'placers,' including all forms of deposit, *excepting veins of quartz, or other rock in place*, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims."

Section 2333 of the Revised Statutes of the United States is as follows:

"Where the same person, association or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for patent for the placer claim, with the statement that it includes such vein or lode; and in such case a patent shall issue for the placer claim, subject to the provisions of this chaper, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings, and where a vein or lode, such as is described in section 2320, is known to exist within the boundaries of a placer claim, an application for a patent of such placer claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof." (Act of Congress, May 10, 1872, Ch. 152, Sec. 11).

The Supreme Court of the United States in *Noyes v. Mantle*, 127 *U. S.*, page 353 says:

"The section can have no application to lodes or veins within the boundaries of a placer claim, which have been previously located under the law of the United States and are in possession of the locators or their assigns; for, as already said, such locations, when perfected under the law, are the property of the locators, or parties to whom the locators have conveyed their interest. As said in *Belk v. Meagher*, 104 *U. S.* 279, 'A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed and will pass by descent.' The section can apply only to lodes or veins not taken up and located so as to become the property of others. If any are not thus owned, and are known to exist, the applicant for the patent must include them in his application, or he will be deemed to have declared that he had no right to them. *Sullivan v. Iron S. M. Co.* 109 *U. S.* 550. * * * * Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface, so as to be readily traced, and notice of the location is recorded in the usual books of record, we think it may safely be said that the vein or lode is known to

exist, although personal knowledge of that fact may not be possessed by the applicant for the patent of a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode."

It is contended, however, that because the placer claim was located first, no entry thereon could be made to locate a lode claim. In *Noyes v. Mantle*, 127 *U. S.* 353, neither the opinion in the Supreme Court of the United States nor in the Montana supreme court shows whether the lode was located prior to the placer claim or not.

Mantle v. Noyes, 5 *Mont.* 274; 5 *Pac.* 856.

The facts in the case do show, however, that the lode was located on April 23, 1878, and that the placer application was made December 14, 1878. As the placer applicants would have to do at least five hundred dollars worth of work before they could apply for a patent, and as they must have appiied to the surveyor general for a survey of their claim, had it surveyed and field notes returned to them before application for patent was filed in the local land office, it could well be presumed that their location must have been prior to April 23, 1878. But, however this may be, as neither the supreme court of Montana nor the Supreme Court of the United States mentions the question of priority of location, it seems that the placer claim must have been located prior to the lode claim, because if the lode claim was first located, it gave to the owner thereof the right to not only all the lodes contained therein but to the exclusive possession and enjoyment of the surface thereof, so that a placer claim thereafter located would acquire to no right to anything whatever.

§ 2322, *Rev. Stat. U.S.*

The defendant in error believes that the questions in this case were disposed of by the supreme court of the state of South Dakota upon grounds entirely independent of any federal question. Certainly the decision of that court as to the discovery upon the Tin Bar No. 1 was based solely upon the doctrine of estoppel, the court holding that the locators of the Holy Terror Lode were estopped to deny the validity of the Tin Bar No. 1, having partici-

pated in the location of said lode, placed their location certificate of record and conveyed interests to other parties who relied upon the acts done by them. As to the main question in the case, the right of one co-tenant to relocate the common lode claim, when the annual labor has not been performed, so as to exclude his co-owners from any interest in the ground, the court bases its decision not upon any construction or applicability of the statute of the United States, but solely upon the doctrines of co-tenancy.

If, however, the writ of error should not be dismissed in this case, we think that the decision of the supreme court of the State of South Dakota is supported by the decision of this court above quoted, by the decision of every lower court which has passed upon this question, by the opinions of the distinguished gentlemen who have written treatises upon mining law, and whose opinions are quoted in almost every mining case by this Court, and by the principles of justice and fair dealing which should prevent the locator of a claim from representing to the world that he has made a discovery of mineral upon land, and afterwards turning around and saying to those who have relied upon his representations, that they were untrue; and which prevent a partner in a mining claim, when he has the option of making his location perfectly valid by merely resuming work after the annual work has not been done, from relocating the ground for himself and thus depriving his partners of their interest in the claim.

Respectfully submitted,

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Supreme Court of the United States.

No. 230.—October Term, 1900.

Edward W. Speed, as Administrator of William B. Franklin, deceased, et al., Plaintiffs in Error, *vs.* Patrick B. McCarthy.	In error to the Circuit Court of Pennington County, State of South Dakota.

[April 29, 1901.]

Patrick B. McCarthy commenced this action in the Circuit Court of Pennington County, South Dakota, against William B. Franklin and others, to determine their adverse claims in and to certain mining property. Before the trial William B. Franklin died, and his heirs and his administrator, Edward W. Speed, were substituted.

The Circuit Court filed findings of fact and conclusions of law, and entered judgment for defendants on the facts so found.

The facts found by the trial court are thus stated in the opinion of the Supreme Court:

"On September 16, 1882, Jacob F. Reed and William Franklin located a portion of the ground in controversy as the Reed placer mining claim. From the date of location until 1892 Reed and Franklin were in actual, notorious and peaceable possession of the claim, were acknowledged and reputed to be its owners, and during each year performed the required development work. They applied for patent November 23, 1892. Final entry was made March 13, 1893. There was no application for a lode on the placer site aside from the placer claim. The boundaries of the claim as patented coincide with its boundaries as staked upon the ground at time of location. January 25, 1888, Reed, Franklin, Thomas C. Blair, and Frank Eaton marked the boundaries of Tin Bar No. 1 claim upon the ground with stakes, as required by law, posted a discovery or location notice thereon, and within sixty days thereafter recorded a location certificate, but did no other act of location at that time. The location or discovery notice of this claim was posted inside the boundaries of the Reed placer claim, and the point claimed as discovery on the Tin Bar No. 1 is the same point at which the notice was posted. No labor has been performed or improvement made upon the claim, except about four days' work in 1889 and about four days' work in 1891; such work not exceeding $14 in each of those years. There was no agreement on the part of defendants Blair or Franklin with plaintiff to perform labor or make improvements on Tin Bar No. 1 in 1893 or 1894, and no contractual relation existed between them in regard to such claim when the Holy Terror lode claim was located. January 25, 1888, Blair and Eaton did the same acts of location with respect to Tin Bar No. 2 that were done in respect to Tin Bar No. 1. No labor has been performed, or improvement made,

upon Tin Bar No. 2, except about four days' work in 1891, of value not exceeding $14. There was no agreement on the part of defendants Franklin or Blair with plaintiff to perform labor or make improvements upon Tin Bar No. 2 in 1892, 1893, or 1894, and there was no contractual relation existing between them in regard to such claim during those years. Defendant Franklin located the lode claims Holy Terror and Keystone No. 4 on June 28, 1894, and September 20, 1894, respectively, and the law has been complied with, so far as it relates to those claims, since the date of each. Defendants are the owners of the Holy Terror and Keystone No. 4, save for the rights of the plaintiff in this action. No adverse was filed by plaintiff or other owners of either Tin Bar No. 1 or 2 to the application for patent to the Reed placer claim. At and prior to the time of the application for patent to the placer claim there was no known lode or vein thereon within the boundaries of either Tin Bar claim of such character as to render the ground more valuable because of its presence, or to justify the expenditure of money for either exploitation or development. There was no application for patent to any lode or vein included in the placer claim in the application for patent to the placer claim. The Holy Terror embraces 1.62 acres of the ground covered by Tin Bar No. 1, and Keystone No. 4 embraces 2.71 acres of the ground covered by Tin Bar No. 2. In 1888, Eaton conveyed an undivided one-fourth interest in Tin Bar No. 1 and Tin Bar No. 2 to one George Williams, who, in the same year, conveyed the same interest to plaintiff and one Michael McGuire. On April 22, 1890, Eaton conveyed an undivided one-fourth interest in Tin Bar No. 2 to defendant Franklin, and Blair conveyed a like interest therein to Jacob F. Reed. When this action was commenced, Franklin since deceased and defendants Blair, Favel, and Amsbury each owned an undivided one-fourth interest in the Holy Terror claim and an undivided seven-thirty-sixths interest in Keystone No. 4. Blair acquired his interest in the Holy Terror claim with full knowledge of whatever rights the plaintiff had, if any. During 1891, Blair and Franklin discovered a well-defined ledge of mineral-bearing rock in place, carrying gold, upon Tin Bar No. 2, the point of discovery being outside the limits of Reed placer claim. The location notice on Tin Bar No. 1 was posted upon a well-defined ledge of rock carrying tin, but plaintiff and defendants had no knowledge of the existence of tin or other valuable deposits therein until during the trial of this action in the court below."

Plaintiff appealed to the Supreme Court of South Dakota from the judgment and from an order denying a new trial, and the judgment was reversed and a new trial ordered. 11 S. D. 362. Subsequently a rehearing was had, and judgment was directed to be entered below for plaintiff on the findings of fact for one-eighth interest in and to so much of the ground covered by the Holy Terror claim and the Keystone No. 4 claim as was embraced by Tin Bar No. 1 and Tin Bar No. 2. 12 S. D. 7. This was accordingly done by the Circuit Court, and this writ of error was thereupon allowed.

Mr. Chief Justice FULLER delivered the opinion of the Court:

It is objected that jurisdiction of this writ of error cannot be maintained because no title or right was specially set up or claimed within section 709

of the Revised Statutes. But plaintiffs in error contend that, while they admit that they made no specific reference to the statutes of the United States, their pleading, nevertheless, showed that they asserted title through valid mining claims duly located, and denied the title of defendant in error on the ground that the locations under which he claimed had become forfeited and abandoned, and that that was a sufficient compliance with the requirements of section 709.

We cannot concede that this is so in view of the rule expounded in *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, and many other cases, and are the less disposed to that conclusion, as the case might well be held to have been decided on grounds independent of Federal questions.

Counsel for plaintiffs in error assert in their printed brief that the following questions were presented by the findings of fact:

"First. Whether Tin Bar No. 1 claim, in its entirety, was extinguished and lost to the owners thereof by the patenting of the Reed placer claim.

"Second. Whether the Tin Bar No. 2 claim, to the extent that it conflicted with the Reed placer, was extinguished and lost to the owners thereof by the patenting of the placer claim.

"Third. Whether, notwithstanding the failure of the owners of the Tin Bar claims to perform thereon the work required by section 2324, R. S., those claims continued to be valid and subsisting claims, and the locators thereof or their grantees cotenants in respect thereto; so that one of such locators or grantees could not make a new location, for his own benefit solely, and include therein a portion of the ground covered by said Tin Bar claims although, by reason of such failure to work, said claims had become 'open to relocation in the same manner as if no location of the same had ever been made.'"

And they insist that these questions could only have been determined by the application of the provisions of chapter six of Title XXXII of the Revised Statutes correctly interpreted, particularly of section 2324.*

*"SEC. 2324. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are

But the Supreme Court of South Dakota held that plaintiffs in error, defendants below, were not in a position to allege or prove against defendant in error, plaintiff below, that the declarations contained in the recorded location certificates were false.

In its first opinion, after saying that there was "certainly no reason for holding that the owner of an unpatented placer claim cannot locate a lode claim, or consent to such a location being made by others, within the boundaries of his placer claim;" and also that "if the Tin Bar claims were located when application for patent to the placer was made, they were not affected thereby, no application for lodes having been included in the application for the placer patents;" the court proceeded to hold that the conduct of the original locators was such as to induce "persons who might examine the records to believe that they were the owners of properly located mining claims," and that the rights of defendant in error in this action depended "upon the facts which the conduct of the locators induced him to believe existed when his interest in the claims was acquired. It would be a travesty on justice to permit the locators to now impair such rights by asserting that their recorded representations were false. Neither of the defendants is in any better position than the original locators, and all are estopped from denying the validity of the Tin Bar locations."

In the opinion on rehearing the court said that the findings of the Circuit Court showed "that Reed, Franklin, Blair and Eaton recorded a location certificate for Tin Bar No. 1, and that Blair and Eaton recorded a location certificate for Tin Bar No. 2, in the office of register of deeds in the proper county, before plaintiff purchased his interest in such claims; that neither defendant is in any better position than the original locators; and, whether or not plaintiff examined and relied upon the records, we think defendants are estopped from denying the validity of these locations."

If, as thus held, defendants below could not deny the validity of these locations, the estoppel covered the objection to the right to locate a lode

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held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures."

claim within a placer claim previously located, and the objection based on the supposed effect of the patenting of the placer claim, as raised on this record. And whether a party is estopped or not is not a Federal question. *Gillis* v. *Stinchfield*, 159 U. S. 658; *Pittsburgh Iron Co.* v. *Cleveland Iron Mining Co.*, 178 U. S. 270.

Having determined that for the purposes of this action the Tin Bar claims were to be regarded as valid in their inception, the Supreme Court considered the controversy as to the right of a co-tenant to relocate a mining claim when the annual assessment work has not been done, and obtain title as against his co-tenants.

The court held that the relation of co-tenant existed between McCarthy and Franklin when Franklin located the Holy Terror and Keystone claims; that original locators may resume work at any time before relocation; that Franklin's acts of relocation did not terminate the fiduciary relation between himself and McCarthy, and said: "We think the Circuit Court should have adjudged the defendants to be trustees, and have enforced the trust. This conclusion is not precluded by the language of the Federal statutes. They provide that upon a failure to comply with required conditions as to labor or improvements 'the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made.' Rev. Stat. U. S. § 2324. It is contended that, if Congress intended to have the relocator regarded as a trustee under any circumstances, such intention would have been expressed in the statute. The contention is not tenable. The trust results from the fiduciary relation of the parties, and not from the operation of the statute."

The State court thus disposed of this branch of the case upon general principles of law, and its decision did not rest on the disposition of a Federal question.

Counsel argue, however, that the court, before reaching the question of co-tenancy, was compelled to hold and did hold that the Tin Bar claims existed at the time of the location of the Holy Terror and Keystone claims, and that in so holding the court necessarily decided against the contention of plaintiffs in error that the Tin Bar claims had absolutely ceased to exist by virtue of the statute properly interpreted.

But was that contention so put forward as to constitute the special assertion of a right given or protected by the act of Congress? The only approach to such an assertion was the statement of plaintiffs in error in their amended answer, that defendant in error intended to set up certain rights under the Tin Bar claims, and that these claims were abandoned and forfeited before the Holy Terror and Keystone claims were located. We think these general allegations fall short of that definite claim of a right

or title under a statute of the United States, which section 709 requires. And that, as the record stands, this court would not be justified in holding that the State court denied a right or title specially set up as secured by the statute, when it determined this particular question on the general principles of law recognized as prevailing in South Dakota.

Writ of error dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.